

THE CASE FOR FIDUCIARY DUTY AS A RESTRAINT ON EMPLOYER OPPORTUNISM UNDER SALES COMMISSION AGREEMENTS

Samuel J. Samaro*

*A salesman is got to dream, boy. It comes with the territory.*¹

I. INTRODUCTION

Most employees who are “in sales,” that is, who sell products and/or services for a living, are compensated on an incentive basis²: income fluctuates with performance,³ usually in accordance with a periodic (more

* B.A., J.D., Rutgers University; LL.M., New York University. Samuel J. Samaro is a partner with the law firm of Pashman Stein, P.C. in Hackensack, New Jersey. This Article is dedicated to my wife, Angela, and my children Emily and Evan, who endured my absence on too many sunny days as the piece was being written. Special thanks to my law firms who, wittingly or unwittingly, also donated some of my time.

1. ARTHUR MILLER, *DEATH OF A SALESMAN* 138 (spec. illustrated ed. 1981).

2. See Sharon O'Malley, *Considerable Options: There's No Single Sales Compensation Plan that Fits All, and Progressive Dealers are Finding That Customization is Key*, PROSALES MAGAZINE, Dec. 2002, at 24 (quoting sales compensation expert John Bremen for estimation that “85 percent of sales professionals rely upon commissions for at least part of their salary”); DAVID W. BELCHER, *COMPENSATION ADMINISTRATION* 510 (1974) (noting that a 1970 study of 375 companies with sales organizations revealed that 80% of them used incentive plans for compensating sales employees); see also *Bock v. Computer Assocs. Int'l, Inc.*, 257 F.3d 700, 706 (7th Cir. 2001) (noting that “[t]he term ‘wage-incentive systems’ has been defined as ‘a method of relating wages directly to productivity’” and that “‘commissions’ are the paradigmatic form of incentive compensation for salespersons”).

3. The distinction between incentive and non-incentive compensation is not always clear. It can be argued that in an absolute sense, most compensation plans are incentive plans: people who perform well tend to receive better raises than people who do not. The Conference Board, a business policy and research group, defines an incentive compensation plan as setting “performance goals for specific jobs and reward[ing] the incumbents for achieving the goals.” THE CONFERENCE BOARD, REPORT NO. 1127-95-RR, *INDIVIDUAL INCENTIVE PROGRAMS: A RESEARCH REPORT* 7 (1995). Similarly, Connecticut Minimum Wage Regulations define an “incentive plan” as

any method of compensation, including without limitation thereto, commissions, piece rate, bonuses, etc., based upon the amount of results produced, where the payment is in accordance with a fixed plan by which the

frequently than annually) reconciliation schedule.⁴ There are numerous types of sales incentive plans, some featuring large incentive components, some not.⁵ The prototypical plan only compensates employees well⁶ when they have selling success and bases the amount of compensation on a formula tied to the revenues or profits of particular transactions.⁷ Such plans are commonly described as “commission” plans.⁸

employee becomes entitled to the compensation upon fulfillment of the conditions established as part of the working agreement.

CONN. AGENCIES REGS. §31-60-1 (1962). The idea seems to be that in incentive plans, the relationship between performance and pay is more direct than in non-incentive plans, whether or not the performance is measured objectively.

4. By “reconcile” it is meant that the incentive portion of compensation is calculated and paid to the employee. Some states require periodic reconciliation, as for instance New York:

A commission salesman shall be paid the wages, salary, drawing account, commissions and other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned. . . .

N.Y. LAB. LAW § 191 (McKinney 2005).

5. For a thorough description of different types of incentive plans, *see* BELCHER, *supra* note 2, at 311–35.

6. By “well,” it is meant that the employee is well-compensated by comparison to other sales employees and by comparison to other employees who perform work requiring similar skill and effort. That, of course, is a generalization. However, it is fair to say that the goal of most commission plans is to provide an upside potential that exceeds what the employee could otherwise earn if paid on a time basis and to punish correspondingly non-performers with an income that is lower than what a fixed compensation employee might expect. *See* EUGENE M. JOHNSON, DAVID L. KURTZ & EBERHARD SCHEUTING, *SALES MANAGEMENT: CONCEPTS, PRACTICES, AND CASES* 404 (1986).

Direct motivation is the key advantage of the commission method of compensation. A strong incentive is provided to increase productivity. Sales people are encouraged to think and conduct themselves as if they were in business for themselves. Strong performers are attracted and encouraged, whereas marginal performers are eliminated.

Id.

7. While commission formulas may be tied to either profit or revenue, the preference appears to be to tie them to profit. *See* Danielle Kennedy, *Rep Talk: Independent Contractor or Employee? Commission or Draw: This Five-Step Plan Can Help You Decide How to Pay Your Reps*, ENTREPRENEUR MAGAZINE, Oct. 1998, at 99, 100 (“No matter what industry the business owners or representatives I interviewed came from, they all agreed that commissions must be based on gross profit.”); O’Malley, *supra* note 2 (“[A] large number of dealers pay commissions on margins—as opposed to commissions on gross sales revenue—for two reasons: It helps curb the cost of compensation, and it propels sales reps to sell at the highest possible price.”)

8. The risk-reward/carrot and stick aspect of commissions earnings, discussed *supra* note 6, is not typically described as a requirement of a commission plan. Most statutory and case law descriptions simply focus on the requirement that commissions be a percentage of

Commission plans are usually memorialized within documents called, simply enough, commission agreements. Disputes over commission agreements are common and tend to fall into two categories: disputes over what unclear agreements mean⁹ and disputes over whether clear agreements should be modified in the interest of fairness.¹⁰ Because commission agreements tend to be one-sided affairs drafted by employers,¹¹

profit or revenue associated with the thing sold. See, e.g., MICH. COMP. LAWS SERV. § 600.2961(1)(a) (LexisNexis 2005) (“‘Commission’ means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amounts of profits.”); CAL. LAB. CODE § 204.1 (Deering 2005) (“Commission wages are compensation paid to any person for services rendered in the sale of such employer’s property or services and based proportionately upon the amount or value thereof.”); *Keys Motors, Inc. v. Div. of Labor Standards Enforcement*, 242 Cal. Rptr. 873, 875–76 (Cal. Ct. App. 1987) (explaining that two requirements of a commission plan are the selling of a product or service and compensation as a percentage of sale price). However, it seems fair to include the carrot and stick concept as part of the definition. To begin with, it is certainly an important theoretical attribute of commission compensation. See JOHNSON, KURTZ & SCHEUNG, *supra* note 6, at 404. Moreover, there is a point at which the absence of risk will negate a finding that the plan at issue is a commission plan. Thus under regulations implementing the Fair Labor Standards Act, for instance, a compensation plan without risk is not a commission plan:

A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.

29 C.F.R. § 779.416(c) (2005).

9. See, e.g., *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1996) (disputing meaning of unclear termination provision). The *Gadsby* opinion is discussed at some length in this Article. See *infra* Part IV.

10. See, e.g., *Willis v. Champlain Cable Corp.*, 748 P.2d 621 (Wash. 1988) (disputing whether the covenant of good faith and fair dealing can modify clear terms of a commission agreement in the interest of fairness); *Cave Hill Corp. v. Hiers*, 570 S.E.2d 790, 793–94 (Va. 2002) (holding that it was reversible error for trial court to allow jury to decide whether commissions are due when commission agreement unambiguously provided that either party could terminate agreement on thirty-days notice).

11. For a description of the more or less typical way in which commission agreements are prepared, see *Ellis v. McKinnon Broadcasting Co.*, 23 Cal. Rptr. 2d 80, 84 (Cal. Ct. App. 1993).

The employment contract is a preprinted form agreement with blanks for the employee’s name, the date, and the amount of the draw. Indeed, [the employer] does not dispute that it occupied a superior bargaining position. Instead, it argues that certain aspects of the contract (i.e., starting date, commission rate,

the plaintiff is invariably the employee, usually an ex-employee,¹² who alleges that she has been deprived of an earned commission.¹³ Such plaintiffs face significant impediments to success on their claims, particularly as compared to other wage claimants.

Largely those impediments are created by uncertainties over the way in which commissions accrue. Accrual, of course, is the method by which wages are earned and become non-forfeitable.¹⁴ When wages accrue over time (hour, week, month, etc., far and away the most common accrual method) it is possible to calculate the amount owed to the employee at any moment and seldom any serious question that the condition precedent to accrual—the presence of the employee at work at a given time and place—

amount of draw, etc.) were actually negotiated and that, in any event, [the employee] never attempted to modify the objectionable forfeiture term.

Id.

12. There is no empirical support for this proposition. However, three observations suggest that it is supported by more than supposition or anecdotal evidence. First, employment often ends over a commission dispute, whether on a voluntary or involuntary basis. *See, e.g., Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996 (10th Cir. 1996) (litigating situation where the employee resigned after commission dispute and brought sexual harassment claims against company); *Brown v. Am. Prop. Mgmt. Corp.*, 1 P.3d 1051 (Or. Ct. App. 2000) (litigating situation where employer refused to allow employee to work pending resolution of commission dispute). Second, it is reasonable to assume that employees are less comfortable suing their current, as opposed to their former employers, and may simply tolerate a greater degree of unfairness while still employed. *See* John J. Donohue III & Peter Seligman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709, 722 n.19 (1993) (“There is much evidence suggesting that only a small percentage of the instances of perceived employment discrimination that occur on the job lead to lawsuits, in part because workers generally do not want to sue their current employer.”). And finally, many, perhaps most, commission disputes are of the post-termination variety, namely, employer refusals to pay commissions *because* the employee has been discharged or has resigned. *See, e.g., Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477 (Cal. Ct. App. 1996) (litigating situation where employer claimed commission agreement terminated right to commissions on termination of employment). The post-termination commissions concept is discussed at some length in this Article. *See infra* Part III.

13. The one large category of commission agreement claims featuring employer as plaintiff is draw recoupment actions. It is common for employers to provide employees with a drawing account, which is a periodically-paid advance on future commissions designed to mitigate the liquidity problems that can arise for employees paid on a commission basis. *See* Blenn v. En Pointe Technologies, Inc., No. H022598, 2003 WL 220603 at *4-5 (Cal. Ct. App. Jan. 31, 2003) (describing a drawing account). When employees fail to earn enough commissions to cover their draws, employers must often initiate recoupment actions to force employees to repay them. *See* Michael J. Greene, Annotation, *Personal Liability of Servant or Agent for Advances or Withdrawals in Excess of Commissions Earned, Bonus, or Share of Profits*, 32 A.L.R.3d 802 (1970) (collecting cases describing draw recoupment actions).

14. *See* BLACK’S LAW DICTIONARY 21 (6th ed. 1990) (defining “accrued compensation” as “compensation earned but not yet paid”).

was or was not met.¹⁵ Either she was there or she was not. Commissions, by contrast, accrue episodically and upon the occurrence of conditions precedent that are defined, often inarticulately,¹⁶ by the parties' commission agreement.¹⁷ A snapshot in time is not a very revealing picture for such employees: at any given moment, a sales employee could be on the cusp of closing many deals but be technically owed nothing.¹⁸ Furthermore, unlike claimants seeking wages that accrue over time, a plaintiff in a commission case must prove to the satisfaction of the court or other tribunal that she correctly interprets the terms and conditions of the accrual mechanism.¹⁹ No rules have developed in the area of commissions claims, as they have in other employment law contexts,²⁰ to assist the plaintiff in meeting that

15. This, of course, is an intuitive explanation: When something accrues on a temporal basis, the triggering event can be nothing other than the passage of time. However, there is more to the story. Employers enjoy very few defenses to accrued wages. *See infra* Part II.A. Thus, once time has passed, there is a sense of finality to wage obligations that does not exist in most money-owed-for-services contexts.

16. *See, e.g., Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1328 (discussing an agreement that was ambiguous on question of whether commissions continue to accrue after termination).

17. *See, e.g., Mytych v. May Dept. Stores Co.*, 793 A.2d 1068, 1075 (Conn. 2002). (“[I]n Connecticut, there is no . . . settled doctrine regarding the time at which an employee’s right to his wages vest, and, in fact, we have concluded herein that our wage payment statutes expressly leave the timing of accrual to the determination of the wage agreement between the employer and employee.”).

18. For an extended discussion of the “snapshot in time” concept, *see infra* note 59 and accompanying text.

19. *See, e.g., Corcoran v. F. & W. Welding Serv., Inc.*, No. CV 91036083S, 1998 WL 13873 at *1 (Conn. Super. Ct. Jan. 13, 1998) (awarding summary judgment to employer when, *inter alia*, employee failed to meet his burden of proof to establish terms of commission agreement); *Benadum v. Cincinnati Floor Co.*, No. 85AP-176, 1986 WL 7489 (Ohio Ct. App. June 30, 1986) (sustaining jury verdict in commission claim on behalf of employee; rejecting employer argument that employee failed to carry burden of proof on commission accrual mechanism).

20. Claims for unpaid overtime compensation arising under the Fair Labor Standards Act, for instance, are subject to the employee-friendly presumption when the employer has not maintained adequate time records. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Mt. Clemens*, the Supreme Court observed that:

where the employer’s records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of the uncompensated work. Such a result would place a premium on an employer’s failure to keep proper records in conformity with his statutory duty.

Id. at 687.

Instead,

[i]n such a situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer

burden.

Forty-two states and the District of Columbia have wage payment statutes.²¹ By and large, those statutes treat employers who fail to pay wages harshly,²² exposing them to a range of penalties and extra-

to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687-88. The accrual question in overtime claims turns on the number of hours worked; the accrual question in commission claims turns on the employee's having met the agreed-upon condition precedent to payment. Because employers typically draft commission agreements, just as they keep time records, there could be a presumption in commission cases that favors the employee's accrual evidence when there is doubt concerning what the parties had agreed to. That, alas, is not the way that such problems are typically handled. See, e.g., *Corcoran*, 1998 WL 13873, at *1 ("Furthermore, as there was no written employment agreement between Corcoran and F & W, the employer . . . set the rules as to whom and when commissions were due, Corcoran, unfortunately for him, was an employee at will in the eyes of the court.").

21. *Medex v. McCabe*, 811 A.2d 297, 304 (Md. 2002). The states not having them are: Alabama, Arkansas, Florida, Georgia, Mississippi, Missouri, North Dakota and Tennessee.

22. There is, however, a great deal of variation to that harshness. Some statutes, such as New Jersey's, only provide for modest fines and quasi-criminal sanctions, not extra-contractual damages or attorneys fees. See N.J. STAT. ANN. § 34:11-4.10 (West 2000).

Any employer who knowingly and willfully violates any provision of [the wage payment law] shall be guilty of a disorderly persons offense and, upon conviction for a violation, shall be punished by a fine of not less than \$100 nor more than \$1,000. . . . As an alternative to or in addition to any other sanctions provided by law for violations of [the wage payment law], . . . the [Commissioner of Labor] is authorized to is authorized to assess and collect administrative penalties, up to a maximum of \$250 for a first violation and up to a maximum of \$500 for each subsequent violation. . . .

Id. Other statutes, such as Connecticut's, are far more onerous. See CONN. GEN. STAT. ANN. § 31-71g (West 2003). The statute explains that whether or not violation is willful, violators "may" be:

(1) Fined "not less than two thousand nor more than five thousand dollars or imprisoned not more than five years or both. . . if the total amount of all unpaid wages. . . is more than two thousand dollars; (2) Fined not less than one thousand nor more than two thousand dollars or imprisoned not more than one year or both. . . if the total amount of all unpaid wages. . . is more than one thousand dollars but not more than two thousand dollars; (3) Fined not less than five hundred nor more than one thousand dollars or imprisoned not more than six months or both. . . if the total amount of all unpaid wages. . . is more than five hundred but not more than one thousand dollars; or (4) Fined not less than two hundred nor more than five hundred dollars or imprisoned not more than three months or both. . . if the total unpaid wages. . . is five hundred dollars or less."

Id.; § 31-72 (explaining that a plaintiff may recover double damages); § 31-76 (explaining that an employer "shall" be required to pay attorneys fees and taxable costs to prevailing wage claimants).

contractual damages,²³ including fines,²⁴ liquidated damages,²⁵ personal liability for shareholders²⁶ and even criminal sanctions.²⁷ In most of those statutes, commissions are included in the definition of wages.²⁸ Thus, in most states a failure to pay commissions is theoretically the same offense as a failure to pay wages of any other type. However, the wage payment laws only provide better remedies and harsher penalties when a plaintiff proves that accrued wages have not been paid; such laws do not provide guidance on how wage agreements are to be interpreted and thus provide

23. See, e.g., *supra* note 22.

24. See, e.g., CONN. GEN. STAT. ANN. § 31-72 (West 2003) (explaining that a plaintiff may recover double damages).

25. See, e.g., DEL. CODE ANN. tit. 19, § 1103 (1995) (demonstrating a liquidated damages provision).

26. See, e.g., KAN. STAT. ANN. § 44-323 (2000) (stating that “either the corporation or any officer thereof or any agent having the management of the corporation who knowingly permits the corporation to engage in [a violation of wage payment laws] shall be deemed the employer for purposes of this act”).

27. See, e.g., CONN. GEN. STAT. ANN. § 31-71g (West 2003) (describing appropriate prison sentences in lieu of or in addition to fines where employers violate wage payment laws).

28. The following states have wage collection laws that do specifically define commissions as wages: Alaska, Louisiana, Maine, Montana, Oregon, South Dakota, Virginia, and Wyoming. In five of them, Louisiana, Maine, South Dakota, Virginia, and Wyoming, the statutes do not define the term “wages” at all. However, courts in at least two of those states, Louisiana and Maine, have held that commissions are protected under the wage payment laws. *Pearce v. Austin*, 465 So.2d 868, 873 (La. Ct. App. 1985) (holding that for purposes of wage collection actions, commissions are wages); *Purdy v. Cmty. Telecomm. Corp.*, 663 A.2d 25, 29 (Me. 1995) (holding that wage payment statute applies to commissions). The Oregon statute defines wages in broad, generic terms. OR. REV. STAT. § 652.210(3) (1987) (“‘Wages’ means all compensation for performance of service by an employee for an employer whether paid by the employer or another person, including cash value of all compensation paid in any medium other than cash.”). Case law suggests that it is to be interpreted very broadly. See *State ex rel. Nilsen v. Oregon State Motor Ass’n*, 432 P.2d 512, 514 (1967) (“We construe ‘wages’ to mean *all* earned compensation contracted to be paid by the employer for the employee’s personal service regardless of the nature of such compensation.”). Only the Montana statute defines wages in a way that leaves open the possibility that commissions were deliberately left out. MONT. CODE ANN. § 39-3-201 (2003) (“‘Wages’ includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, and all tips and gratuities. . . .”). The list does not purport to be exclusive. However, by comparison to the typical wage payment law definition of “wages,” found in almost identical form in most of the laws, the absence of commissions seems meaningful. See e.g., CAL. LAB. CODE § 200(a) (West 2003) (“‘Wages’ includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.”); 43 PA. STAT. ANN. § 260.2a (West 1992) (“[Wages] includes all earnings of an employee, regardless of whether determined on time, task, piece, commission or other method of calculation.”) A Montana court does not appear to have addressed the question, at least in a published opinion.

no direction on how commissions accrue.²⁹ Because commission claims usually turn on accrual questions, they benefit very little from the wage payment laws and are typically litigated as nothing more than common law contract claims.³⁰

But in contract they face impediments created by a competing policy concern, namely, the employment at will doctrine and its analog, management prerogative.³¹ It happens this way: A dispute arises that

29. See *Shortt v. New Milford Police Dep't*, 562 A.2d 7, 14 (Conn. 1989) (noting that wage payment law "does not embody substantive standards to determine the amount of wages that are payable but provides penalties in order to deter employers from deferring wage payments once they have accrued"); *Harding v. Duquesne Light Co.*, 882 F.Supp. 422, 427-28 (W.D. Pa. 1995) (noting that wage payment law "does not create a statutory right to wages; rather, 'it provides a statutory remedy when the employer breaches a contractual right to earned wages.' [citation omitted] It is the employment agreement between the parties that controls in determining whether earned wages are due."). The wage payment laws are not what has been termed "minimum terms" laws. See SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION & EMPLOYMENT LAW* 1, 936 (2000) (noting that the Fair Labor Standards Act overtime and minimum wage provisions constitute "minimum terms laws" that establish "minimum substantive standards that set a floor for private bargaining").

30. An astounding number of judicial decisions involving commission issues fail to even mention the applicable wage payment law. They simply treat the commission question as a matter of common law contract interpretation. See, e.g., *Andree v. Siemens Energy and Automation, Inc.*, 90 F.App'x 145 (7th Cir. 2003) (applying Wisconsin law); *Brozo v. Oracle Corp.*, 324 F.3d 661 (8th Cir. 2003) (applying Minnesota law); *Abedi v. Kobo Products, Inc.*, 44 F.App'x 96 (9th Cir. 2002) (applying California law); *Mullowney v. Data General Corp.*, 143 F.3d 1081 (7th Cir. 1998) (applying Illinois law); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1995) (applying Ohio law); *Pearce v. ELIC Corp.*, 329 N.W.2d 74 (Neb. 1982) (noting that the parol evidence rule may be applied to disputes in commission agreements); *Benadum v. Cincinnati Floor Co.*, No. 85AP-176, 1986 WL 7489 at *14-15 (Ohio Ct. App. June 30, 1986) (noting that the procuring-clause theory applies to commission contracts); *Dooley v. Serv. Station and Related Indus., Inc.*, 32 Phila. 218 (Pa. C.P. 1995) (applying the plain meaning rule to interpret a commission agreement); *Polenz v. TCI Cablevision of Wis., Inc.*, 587 N.W.2d 457 (Wis. Ct. App. 1998) (noting that common law applies where there is no compensation agreement); *Krein v. NDII Securities Corp.*, 406 N.W.2d 164 (Wis. Ct. App. 1987) (applying the plain meaning rule to interpret a commission agreement). The failure of a significant number of courts even to mention the wage payment laws when resolving commission claims is quite significant and suggests something about the standing of those laws in the collective consciousness of lawyers and judges. It is difficult to imagine, for instance, a court resolving a discrimination or overtime claim without at least a passing reference to the applicable statute. That it occurs frequently in the commission context indicates a perception that commission claims are common law contract actions, undoubtedly because such claims have received little notoriety as statutory causes of action. It seems likely that that lack of notoriety is a function of the fact that little has been achieved historically by pleading the wage payment laws.

31. "At will" means more than just freedom to hire and fire; it also implies the ability to run one's business free of outside interference. See William R. Corbett, *The "Fall" of Summers, The Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 308 (1996) (noting that management prerogative is one of

exposes a gap in a commission agreement or an unambiguous provision that is patently unfair. Courts have frequently held, both explicitly and implicitly, that the default for unclear agreements is to the employment at will rule and the rule's corollary that rights not bestowed by the commission agreement are retained by the employer.³² As such, when a gap in a commission agreement causes uncertainty, it is only sensible to fill the gap by assuming that the employer would have reserved its traditional prerogatives.³³ When a literal interpretation of an unambiguous provision causes hardship, it is simply unfair in the way that at will determinations are often unfair, regrettable but not actionable.³⁴

It is the thesis of this paper that because of the way that commissions accrue—episodically and on terms typically imposed by employers—sales employees are particularly vulnerable to employer opportunism.³⁵ That opportunism is not restrained by the wage payment laws, which take no sides in accrual disputes and is unreliably restrained by the law of contracts, which is not a bountiful source of rights that restrain opportunism under the best of circumstances³⁶ and is a particularly poor source of such rights for employees in disputes against their employers.³⁷

employment at will's aliases)

32. See, e.g., *Corcoran v. F. & W. Welding Serv., Inc.*, No. CV 91036083S, 1998 WL 13873 at *1 (Conn. Super. Ct. Jan. 13, 1998) (holding that because there was no written employment agreement, employee was at will and employer set the rules for whether and when commissions were paid).

33. See *Gadsby*, 71 F.3d at 1328 (noting that “absent express language to the contrary, a [commission agreement] would not subject an employer to potential liability *ad infinitum*,” for example, when the employer fails to incorporate an end-point to payment of post-termination commissions, it is logical to assume that the employer would have done so).

34. See *Willis v. Champlain Cable Corp.*, 748 P.2d 621, 627–28 (Wash. 1988) (recognizing the harshness of the at-will rule but refusing to hold that an implied covenant of good faith and fair dealing could contradict clear terms of a commission agreement).

35. By “opportunism,” it is meant “self-interest seeking with guile,” in Oliver Williamson’s phrase. OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING*, 47 (1985). See also D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1424, 1433 (2002) (describing the Williamson definition of opportunism as well as others).

36. Smith, *supra* note 35, at 1487 (noting that “judicial efforts to police opportunism in contractual relationships tend to be limited to the contract doctrine of good faith and fair dealing”); Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585, 586 (1996) (noting that covenant of good faith and fair dealing is a gap-filling device that only applies when contract is silent or ambiguous on a particular question and is a doctrine shrouded in mystery, leading to unpredictable and inconsistent results).

37. See *Brozo v. Oracle Corp.*, 324 F.3d 661, 668 (8th Cir. 2003) (noting, in context of dispute over meaning of commission contract, that Minnesota does not recognize covenant of good faith and fair dealing); *Willis*, 748 P.2d at 627–28 (holding that covenant of good faith and fair dealing could not restrain employer from relying on provision of contract that allowed it to deny employee of post-termination commission for which employee was

The solution advocated here requires that the job security question be bifurcated analytically from the wage question. When the claim is that the employee has been unlawfully deprived of job security (i.e., has been unlawfully discharged), employment law and where appropriate, the at will rule, controls.³⁸ When the dispute turns on wages, that is, whether a commission is due, a second question must be asked: Does the employee allege facts that, if believed, would support the assertion that the employer acted opportunistically? If the answer is no, the law of contracts governs the liability question.³⁹ If the answer is yes, fiduciary duty law governs the liability question, with particular emphasis on fiduciary principles that have developed under the law of general partnerships. The argument for applying fiduciary law under those circumstances and in that way is derived from two observations.

The first is that, as relates to the specific question of whether an employee is entitled to be paid a commission, the relationship between employers and sales commission employees fits the classic model of relationships that are fiduciary. That conclusion is based on recent scholarship on the question of when courts interpose fiduciary obligations, in particular, Professor D. Gordon Smith's "Critical Resources Theory of Fiduciary Duty."⁴⁰ Professor Smith argues that fiduciary duty arises whenever "one party ('the fiduciary') acts on behalf of another party ('the beneficiary') while exercising discretion with regard to a critical resource belonging to the beneficiary."⁴¹ Sales commission arrangements fit that model because employers exercise discretion over the variables that determine whether an employee will be paid a commission and then collect the employee's "share" from third parties.⁴²

The second observation is that the entrepreneurial aspects of

procuring cause); *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 91 (1983) (holding that implied covenant of good faith and fair dealing does not apply to employment contract terminable at will).

38. This Article takes no position on the continuing utility of the at-will rule in the job security context. Rather, it argues that accepting for the moment that assumptions and policy choices that underlie the rule are valid, such assumptions and choices do not support protection for employer opportunism in a commission dispute.

39. Commission disputes that do not feature employer opportunism are more common than one might think. For instance, employers often must resolve disputes between employees competing for the same commission and frequently get sued by the disfavored claimant. *See, e.g., Petronella ex rel Richardson v. Combined Ins. Co. of Am.*, No. CV 940544040S, 1997 Conn. Super. LEXIS 2753 at *1 (Conn. Super. Ct. Oct. 9, 1997) (involving facts where employee sues alleging that employer paid commission to another employee rightfully belonging to her). Such claims would not ordinarily involve plausible allegations of employer opportunism—the employer is not lining its own pocket and thus is not acting self-interestedly—and thus would remain the province of contract law.

40. Smith, *supra* note 35.

41. *Id.* at 1402.

42. *See infra* Part IV.

commission sales employment have much in common with the entrepreneurial aspects of a general partnership. Commission sales employment, like general partnership, is an investment scheme.⁴³ Remuneration is delayed; in order to realize gain, “investors” must consign a great deal of discretion to their joint adventurers.⁴⁴ Fiduciary duty principles have developed in the partnership context because discretion provides entrusted partners with “the opportunity to expropriate value” from those who have bestowed trust.⁴⁵ The same opportunity to expropriate value, stemming from similar operational imperatives, is afforded to the employers of commission sales employees.⁴⁶ Partnership law is therefore a useful starting point for consideration of how and when fiduciary duty can be used to limit employer opportunism under sales commission agreements.

The second Part of this Article attempts to define commissions as a compensation system and argues that the key differentiation between sales commission plans and most compensation methods is risk. The third Part describes the state wage collection regime, its weaknesses as a system of rules for the collection of commissions earnings, and the problems inherent in a contingent wage accrual mechanism that emanates chiefly from the contract prepared by the employer. The fourth Part describes and analyzes two published opinions that exemplify the problems described in the second part, most particularly with regard to the at will rule and the inadequacy of contract law as a source of protection for sales commission earnings. The fifth Part makes the case for acknowledgement of fiduciary duty as a restraint on employer opportunism under sales commission

43. The Uniform Partnership Act defines “partnership” as “an association of two or more persons to carry on as co-owners of a business for profit.” Uniform Partnership Act § 101(6) (1997). “Investment” is defined as “the investing of money or capital in some species of property for income or profit.” 3 WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 1306 (2d ed. 1954). Clearly a partnership is an investment, with individuals investing their money or labor or both in the hopes of achieving a favorable return. See *Dreyfuss v. Dreyfuss*, 701 So. 2d 437, 439 (Fla. Dist. Ct. App. 1997) (noting that a partnership is formed when, inter alia, “parties contribute to the capital or labor of the business”). Commission sales employment is also an investment, not of capital but of labor, where the employee invests the value of her time in the hopes of a favorable return.

44. By “delayed remuneration” it is meant investment risk. For a concise description of why partners must repose discretion in one another, see Carol L. Kline, *Protecting Minority Shareholders in Close Corporations: Modeling Czech Investor Protections on German and United States Law*, 23 B.C. INT’L & COMP. L. REV. 229, 247–48 (1999–2000) (noting that partnerships are founded by a few people who contribute “not only capital, but also experience and labor” and whose business relationships are “characterized by trust, confidence and loyalty”).

45. See Smith, *supra* note 35, at 1491.

46. Sales employees must rely upon their employers to run the business and then collect revenues from third parties from which commissions will be derived. See *infra* text accompanying note 165.

agreements. The sixth Part makes the case for borrowing the scope of that duty from partnership law whenever it is alleged that an employer has acted opportunistically. The seventh and final Part makes the argument that although it would be possible to accomplish the reforms advocated in this Article through changes to the law of contracts, fiduciary duty is a better choice because it is broader and not limited unduly by what is described or implied within the four corners of the commission agreement.

II. RISK

The defining characteristic of a sales commission job is selling risk. Those who work on a commission basis agree to place some percentage of their anticipated annual compensation at risk of non-payment in the event that sales goals are not met.⁴⁷ Often, the quid pro quo for that gamble is the opportunity to reap greater rewards than could otherwise be expected, but not always.⁴⁸ The size of the gamble can vary from complete, e.g., compensation based entirely on commission, to very small, e.g., commission earnings constituting a couple of percentage points or less of total annual compensation.

Risk distinguishes commissions from other compensation methods, even those that feature contingencies. For instance, incentive bonuses are a

47. It is possible to quibble with the phraseology here based upon the type of commission plan under consideration. When the plan at issue is a so-called "straight" commission plan, indicating that employee receives no compensation unless she sells something, it is hard to argue with the assertion that the plan's defining characteristic is risk. When the plan involves a combination of salary and commission (called combination plans), which is the more common of the two, it is possible to focus on reward and not risk. See, e.g., JOE L. WELCH & CHARLES L. LAPP, *SALES FORCE MANAGEMENT* 314 (1983) (explaining that it is possible to focus on reward and not risk, as in "[u]nder [a combination plan], salespeople . . . are given an opportunity to earn additional income for accomplishments which exceed the expected"). The distinction is not significant. First, in most combination plans, employees receive a lower base salary than they would if they were paid on a straight salary basis. See BELCHER, *supra* note 2, at 511 (noting that "if sales jobs are paid on straight salary, salaries are obviously higher than if sales jobs are paid on the basis of salary plus incentive because in the second arrangement base salaries are adjusted downward to account for expected incentive earnings"). Thus, in relative terms, some amount of what such employees could expect to be paid in the absence of a commission arrangement is at risk. More to the point, employees take commission jobs in order to accomplish what is possible, not what is probable or merely average. By accepting a commission job of any type, an employee runs the risk that she will not meet her goals and expectations.

48. It is possible to create a commission plan without "upside" potential, meaning that the maximum that the employee could earn would be a sum approximating the market value of the services were they performed on a fixed compensation basis. See WILLIAM J. STANTON & RICHARD H. BUSKIRK, *MANAGEMENT OF THE SALES FORCE*, 301-02 (3d ed. 1969) (arguing that through a combination of commission caps and base salary design, companies attempt to adjust the ratio between commission and salary to some optimum level, such as eighty percent salary and twenty percent commissions).

common feature of executive compensation arrangements. Bonuses are contingent, in the sense that they are not guaranteed. However, they are discretionary—meaning that they are subject to subjective and not objective contingencies—and are paid or not paid at the whim of the employer.⁴⁹ Thus while employees who take jobs in which they are “bonus eligible” may be described as taking a risk, it is a risk that the law views as fully assumed by the employee and entitled to no special protection. On occasion, bonuses will be subject to objective and not subjective contingencies. Such bonuses are indistinguishable from commissions and are entitled to the same legal treatment.⁵⁰

There are also contingent wage methods that compensate individuals for the quantity of production, often referred to as “piecework.”⁵¹ Such arrangements are nearly as risk free as those that feature fixed compensation. Like wages that are fixed, piecework seldom gives rise to meaningful disputes on the question of accrual: it is possible to calculate what an employee is owed at any given moment simply by counting what she has produced. It is not sufficient simply to be a warm body at work—which renders piecework slightly more risky than jobs for which employees are compensated on a time basis—but the risk of non-payment is very small, at least relative to sales commission employment.

Risk is a difficult concept, and it is not the goal of this Article, beyond the strictly obvious, to define the term or describe the myriad of ways in which sales employees assume risk when they enter into sales commission agreements. For purposes of this paper, it is argued that focusing on the nature of compensation risk leads to three important insights into sales employment as a distinct occupational category. First, the specific type of risk assumed by sales employees causes commissions to accrue differently than wages that accrue over time and, in turn, creates greater hardship for sales employees under the at will rule. Second, risk is not merely assumed by sales commission employees but is transferred by employers, who assume correspondingly less risk when they hire employees on a commission basis. And finally, by virtue of risk, sales commission

49. See *Mathews v. Marietta Toyota, Inc.*, 606 S.E.2d 862, 863 (Ga. Ct. App. 2004) (explaining that discretionary bonuses are not enforceable as wage promises); *Hudson v. Village Inn Pancake House of Albuquerque, Inc.*, 35 P.3d 313, 318 (N.M. Ct. App. 2001) (same); *Kaplan v. Capital Co. of Am., LLC*, 747 N.Y.S.2d 504, 505 (N.Y. App. Div. 2002) (same).

50. See *Blanton v. Robert Half Int'l, Inc.*, No. 2-490/01-1468, 2002 Iowa App. LEXIS 1148 (Iowa Ct. App. October 30, 2002) (holding that incentive compensation called bonus is entitled to the same treatment as commissions); *Medex v. McCabe*, 811 A.2d 297, 302 (Md. 2002) (same).

51. See *Bock v. Computer Assocs. Int'l, Inc.*, 257 F.3d 700, 706–07 (7th Cir. 2001) (noting that a piecework system is an incentive compensation method featuring a “fixed payment for each unit produced”).

employees are entrepreneurial and occupy a somewhat muddled realm between normally distinct relational categories. Together those insights help to differentiate sales employment from fixed compensation employment and to provide the context for evaluation of wage collection principles as applied to commission disputes.

A. Wage Accrual

As noted, wage accrual is the rate at which wages are earned. Under fixed compensation arrangements, wages accrue over time and thus it is possible to calculate what wages are due to an employee at any moment. Under commission sales agreements, by contrast, nothing accrues over time and employees earn their "wages," if they earn them at all, when all preconditions for a commission have been met. Typically there are three: (1) a sale of a product or service for which (2) the employee was the procuring cause and (3) payment of the bill by the customer.⁵²

Wage accrual as a substantive right must be evaluated in conjunction with the so-called at will rule. The at-will principle holds, of course, that in the absence of contractual provisions to the contrary, both employers and employees are free to terminate the employment relationship for any

52. Because commission accrual is a creature of the contract between the parties, it can be almost anything that the parties say it is, and thus, one can only generalize when attempting to describe what is typical. The formulation here is derived from two observations. The first is that when contracts are silent on the question of how commissions are earned, courts often hold that they are earned when an employee can establish that she is the procuring cause of the sale in question. *See Comerford v. Sunshine Network*, 710 So.2d 197, 198 (Fla. Dist. Ct. App. 1998) (stating that if commission agreement is silent, commission is earned when employee makes sale (citing 3 C.J.S. Agency § 187. p. 88 ("Accordingly, an agent selling goods on commission is entitled to a commission on goods sold by him during the continuance of the agency. . . .")))). The second observation is that while employees who work on commissions are often given periodic advances on commissions that they have yet to earn—so called drawing accounts—and are paid on deals before customers have paid for the products or services in question, most commission agreements provide that employees must repay the draws if they do not earn sufficient commissions to cover them or in the event that the customer cancels the order. Courts typically hold that such provisions are enforceable. *See Meyer v. Mason Publishing Co.*, 372 N.W.2d 403, 405 (Minn. Ct. App. 1985) (noting that when agreement is that employee will receive commissions on sales, the employee's commission was not due or earned until amounts for returned merchandise were deducted); *Russo v. New York Life Ins. Co.*, 668 N.Y.S.2d 640, 641 (N.Y. App. Div. 1998) (holding that employer can recoup commission paid to life insurance salesman when insured cancels policy and recoupment is permitted by commission agreement); *Centerbank Mortgage Co. v. Shapiro*, 655 N.Y.S.2d 596, 597 (N.Y. App. Div. 1997) (noting that "it is well settled that an action to recover excess monies paid to an employee from a drawing account 'is viable where an agreement exists by which the employee agreed to repay the excess drawn out of the account above the commissions earned'" (citation omitted)). Hence the formula: commissions typically accrue when the employee sells something and the customer pays the bill.

reason, good or bad. Most employment, whether it is on a commission or fixed basis, is governed by the at-will rule.⁵³

Later in this paper it will be argued that the at-will rule, as the default in employment law, often serves an interpretive function in resolving controversies caused by incomplete or unclear commission agreements.⁵⁴ For present purposes, the at-will rule's significance lies in its role as a delimiting principle for wage claims. Because of the at-will rule, employees have no interest in future wages. There is no right, in other words, to be employed long enough to earn any sum in particular. Any claim for wages is, by definition, a claim for services performed in the past.⁵⁵

The bright line rule with regard to the future is complemented and counterbalanced by a line, nearly as bright, with regard to what has accrued from past service. By and large, fixed compensation employees must be paid for time that they have devoted to their employer's affairs without regard to the quality of such services or the extent to which the services have advanced the employer's business interests. So long as the employee was at the appointed place, at the appointed time, and at least going through the motions of performing the appointed responsibilities, wages will be due.⁵⁶

53. It seems self-evident that most employees are employed at will, and commentators typically assume as much without attribution. See, e.g., Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1512 (2004) (noting that "[de]spite limited inroads on the at-will rule over the last two decades, most employment decisions are still not subject to legal constraints other than 'excluder' reasons"); James Robert Ward, III, *The Endowment Effect and the Empirical Case for Changing the Default Employment Contract from Termination "At-Will" to "For-Cause" Discharge*, 28 LAW & PSYCHOL. REV. 205, 206 (2004) (observing that "it appears most employment contracts are for at-will employment"). The same assumption regarding sales commission employees is made here.

54. See *infra* Part III.

55. See *Yearwood v. Southern Life Systems, Inc.*, 531 S.E.2d 741, 743 (Ga. Ct. App. 2000) (noting that an at-will employee cannot sue to enforce the right to earn wages in the future but may sue to compel payment of wages earned in the past).

56. It has long been assumed by employment lawyers that dissatisfaction with an employee's services is not a defense to a wage claim. The doctrinal underpinnings of that assumption are seldom discussed in the case law or legal literature. It seems that there are at least two reasons that quality is not a defense. First, forty-two states have wage payment statutes. *Medex v. McCabe*, 811 A.2d 297, 304 (Md. 2002). Most of those laws have provisions that prohibit deductions from wages that are not specifically enumerated—general dissatisfaction not being among them. See, e.g., N.Y. LAB. LAW § 193 (Consol. 2005); KAN. STAT. ANN. § 44-319 (2005); OR. REV. STAT. § 652.610 (2003). In *Miller v. C.C. Meisel Co.*, 51 P.3d 650 (Or. Ct. App. 2002), an employee sued to recover unpaid compensation. The employer asserted by way of counterclaim that the employee's failure to adequately perform his responsibilities constituted a defense to the wage claim. *Id.* at 653. Relying upon the Oregon Wage Collection Law, the court rejected the counterclaim and cited another case for the proposition that "there might seldom be prompt payment of

There is, then, a very sharp distinction between the past and the future. The right to be paid for services that have not yet been performed is nearly nonexistent; the right to be paid for past services is nearly unqualified. It is hard to argue that the sum of that equation is neutrality: in almost every way that matters, the at-will rule benefits employers and burdens employees.⁵⁷ However, it is of no small consequence that the price of a free contract⁵⁸ for the employer is that it must settle with its employees before releasing them. Or, to phrase the thought differently, the at-will rule would be more harsh to employees, and the at-will rule's free contract rationale obviously less palatable, if employers could both terminate employees without a moment's notice and then escape liability for their wages.⁵⁹

termination wages if an employer, on some basis besides time worked, was allowed to decide that the wages were not earned." *Id.* at 658. Thus, the first reason that quality is not a defense to a wage claim is that such a defense will more likely than not be proscribed by the applicable wage payment law. The second reason that quality is not a defense is derived from the general rule that employees are not liable for business losses caused by their inability to meet performance standards. That rule was described by the court in *Fried v. Aftac, Inc.*, 587 A.2d 290 (N.J. Super. Ct. App. Div. 1991):

Absent a special agreement, an employee whose best efforts resulted in poor performance, causing a loss of profits, does not become liable for such losses in a breach of contract action. An employer cannot give an employee negative fitness reports, retain the employee, and later sue him for failure to perform the agreement or for overall negligence or carelessness, allegedly causing the company financial losses. . . . The employer's remedy is to fire the employee for ineptness or lack of diligence.

Id. at 297 (citation omitted). If an employer cannot sue an employee whose ineptness causes business loss, it seems to follow that the employer cannot refuse to pay wages because of dissatisfaction with the quality of the employee's services.

57. Some commentators might not agree. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). Professor Epstein argues that the at-will rule is both good and fair. He describes it as good for reasons that are of no concern here. He describes it as fair because of the free contract rationale—it allows both parties to come and go as they please. Putting to one side the metaphysical question of whether a rule must affect all persons equally in order to be fair, there is simply no way to seriously argue that the at will rule burdens employees and employers the same. The prospect of losing one's livelihood upon a moment's notice is simply more daunting, on average, than the prospect of losing a key employee with equal suddenness. For an extended critique of the supposed neutrality of the at will rule, see *Carl v. Children's Hosp.*, 702 A.2d 159, 173–78 (D.C. 1997).

58. The free contract rationale of at will employment was described succinctly in *Nguyen v. CNA Corp.*, 44 F.3d 234 (4th Cir. 1995): "An employee is ordinarily at liberty to leave his employment for any reason or for no reason, upon giving of reasonable notice, without incurring liability to his employer. Notions of fundamental fairness underlie the concept of mutuality which extends a corresponding freedom to the employer." *Id.* at 237

59. No support has been found, scholarly, judicial or legislative, for the proposition that the wage collection regime developed as a conscious attempt to counterbalance the at-will rule, at least with regard to at will's core limitation on the right to job security. There is a great deal of evidence, however, connecting those laws to concerns over other

The symmetry described in the preceding paragraph does not apply to those who work on a commission basis. That is because such employees have no right to a commission until a sale is consummated. In other words, nothing accrues from past service⁶⁰ and thus the right to be paid, moment by moment, is largely inchoate and must focus on events that will or may occur in the future. Because the at-will rule also applies to such individuals, it is possible for them to find themselves caught in a

manifestations of the at-will principle, particularly management's unfettered right to set the terms and conditions of employment. Wage payment laws began to appear in the late 19th and early 20th centuries, largely as a response to the tendency of employers to pay wages in script or tokens that had to be redeemed in company stores. See *Robertson v. Opequon Motor, Inc.*, 519 S.E.2d 843, 850 (W. Va. 1999) (discussing history of wage payment laws). The early cases interpreting those laws devoted a great deal of time to addressing the employer's argument that the laws unconstitutionally infringed upon freedom of contract. See, e.g., *Hancock v. Yaden*, 23 N.E. 253, 255 (Ind. 1890) (upholding 1889 law providing that miners be paid every two weeks and in lawful money); *Atkins v. Grey Eagle Coal Co.*, 84 S.E. 906, 906 (W. Va. 1915) (upholding 1913 law requiring employers to redeem corporate scrip for lawful money and collecting cases from around the country holding similarly). The legislative history over succeeding decades tended to focus on other forms of employer opportunism. In *Mytych v. May Department Stores Co.*, No. 03CV98485223S, 2001 WL 290485 (Conn. Super. Ct. March 2, 2001), the court quoted one legislator, speaking in 1978 about the Connecticut Wage Payment law, as follows:

The payment of earned wages is a gut-level right that should be assured by clear, strong statutes. . . . The weaknesses of these statutes came to my attention through the experience of a constituent whose wage check bounced. . . . A person must be able to count on his paycheck—that it will be forthcoming . . . and that, if paid by check, that the check will not bounce. . . .

Id. at *6. In *Dangerfield v. Montgomery Ward Co.*, 694 P.2d 439 (Kan. 1985), the court, discussing the legislative history surrounding the Kansas Wage Payment law, noted:

The primary purpose of the legislation was to protect employees from the docking or shorting of pay to cover alleged shortages. There was a recognition that the absence of statutory constraints served as an invitation to employers to withhold from an employee wages earned, and benefits such as vacation pay, contributions to pension and welfare funds, and to otherwise manipulate and prey upon employees through misleading statements relative to the terms and conditions of employment.

Id. at 444. The point is that if the wage payments laws cannot be connected to concerns over the lack of job security implicit in the at will rule, they are easily connected to other perceived shortcomings of other manifestations of the at-will rule, namely, management prerogative and the freedom to set the terms and conditions of employment, however onerous on employees.

60. This rule does not apply to the non-contingent portion of a sales employee's wages, as, for example, when total compensation includes a salary and commissions. Throughout this Article, sales commission employees are referred to generically. That is not meant to imply that they all have the same compensation plan; quite to the contrary. There are numerous different types of commission plans, even a partial description of which is beyond the scope of this Article. See BELCHER, *supra* note 2, at 512 (noting that "there are literally thousands of sales incentive plans geared to the organization's products, markets, and marketing objectives").

netherworld of unfulfillable expectations: no right to be paid for work performed in the past and no right to be around long enough to be paid in the future.

B. Risk Transference

Commission sales employees accept higher risk than employees who are paid on a fixed basis. What is also true is that there is an important way in which employers who pay on a commission basis—particularly those who pay on a “straight” commission basis⁶¹—assume less risk than employers who do not. When an employer pays employees on a fixed compensation basis, the employer runs the risk that it is paying too much, that is, that its labor costs are or will be too high relative to gross revenue. When an employer pays its employees on a commission basis, on the other hand, its labor costs, expressed as a percentage of revenue, remain constant, and it is the employees who accept the risk that the actual “value” of their labor may be insufficient to meet goals and expenses.⁶² It is for that reason that commission sales arrangements are especially prevalent in higher risk industries where the need to control labor costs is particularly acute.⁶³

61. “Straight commissions,” of course, means that all income is based upon meeting objective goals and none of it is based upon time. The phenomenon of risk transference is one of the few topics discussed in this Article where there does appear to be important difference between straight commission employees and those who work under combination plans. By risk transference it is meant that the employer assumes less risk when the employee assumes more. It only works that way, however, if it can be said that when taking the contingent portion of an employee’s wages out of the mix, the employer would be paying a lower than market rate for the employee’s services, computed on a time-value basis. That, of course, is the expectation. See BELCHER, *supra* note 2, at 511 (noting that base salaries ordinarily adjusted downward to account for expected incentive earnings). However, it cannot be said that the employer has “transferred” risk if it pays a market rate salary without regard to commissions. Thus, the risk transfer concept is clearly at work when the employee is paid on a straight commission basis and also at work when the employer pays the employee a comparatively lower base salary in light of the employee’s ability to earn commissions. It does not apply at all when the commission percentage is so low, or the employer so generous, that the base salary can fairly be described as the market rate for comparable services, computed on a time-value basis.

62. See STANTON & BUSKIRK, *supra* note 48. It is noted that:

Another big advantage to the company [that pays on a commission basis] is that selling costs are controllable in relation to sales, gross profits, or some other base. The violent fluctuations of selling expenses as a percentage of sales that often occur under salary plans can be virtually nonexistent if men are paid by commission. When a firm is in recession, the ability to forecast and control sales costs is particularly important.

Id. at 368.

63. See *id.* (“In some cases, a new firm that is not strong financially must resort to a commission [plan] because it cannot risk the lack of control over selling expenses, even though otherwise it might be better to pay the men a salary.”). To the same point is WELCH

There are certainly other reasons that employers choose to pay on a commission rather than fixed compensation basis, such as the belief that risk motivates employees to higher achievement.⁶⁴ However, the risk transference benefit has particular relevance to any consideration of employer opportunism. A transaction that transfers risk often creates a duty, implied when not expressed, that the transferor do nothing to harm the transferee's ability to reap the benefit of its bargain.⁶⁵ The classic example of that principle is insurance.⁶⁶ Insurance is meant to provide coverage for fortuitous events, meaning events that had not occurred before the insurance policy was issued nor by the design of the insured after the policy's inception.⁶⁷ If it can be proven that the loss was known by the insured in advance of her purchase of the policy or intentionally caused by her after the policy's issuance, the insurer will be relieved of liability.⁶⁸ This is because the insured's conduct deprived the insurer of the benefit of its bargain, namely, the statistical probability that the event that triggered

& LAPP, *supra* note 47, at 312 ("Generally, a straight commission plan is used by firms that are in a relatively weak financial position and cannot risk any arrangement other than one where selling costs can be related directly to sales.").

64. Most of the sales literature describes the motivational benefits of commission plans. See, e.g., STANTON & BUSKIRK, *supra* note 48, at 312 ("Probably the major advantage of the straight commission method of sales compensation is the terrific incentive it gives the men."); ALBERT H. DUNN, EUGENE M. JOHNSON & DAVID L. KURTZ, SALES MANAGEMENT CONCEPTS, PRACTICES AND CASES 428 (1974) ("Direct motivation is the key advantage of the commission method of compensation. A strong incentive is provided to increase productivity."). But see Alfie Kohn, *Why Incentive Plans Cannot Work*, HARVARD BUS. REV., Sept.-Oct.(1993) (arguing that incentives do not intrinsically motivate people and cause disharmony and dissension).

65. See CBS Broad., Inc. v. The Carsey-Werner Co., No. B151721, 2003 WL 139986 (Cal. Ct. App. Jan. 21, 2003). In *CBS Broadcasting*, the plaintiff lent money on a non-recourse basis, meaning that the borrower was not required to pay it back unless the business venture for which the money was lent proved successful. The borrower made no effort to make the venture successful, the loan was not repaid and the lender sued. The court held that despite the fact that the loan was on a non-recourse basis, the borrower was under an obligation to use commercially reasonable efforts to make the venture successful. It cited another California case for the proposition that

[i]n the case of a discretionary power, it has been suggested the covenant [of good faith and fair dealing] requires the party holding such power to exercise it 'for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract, interpreted objectively.

Id. at *3 (citation omitted).

66. See David G. Newkirk, *An Economic Analysis of the First Manifest Doctrine*: Paul Revere Life Insurance Co. v. Haas, 644 A.2d 1098 (N.J. 1994) 76 NEB. L. REV. 819, 820 (1997) (noting that "[i]t is unchanging black letter law that a contract of insurance is a transfer of risk").

67. See PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 724 (Ind. Ct. App. 2004) (describing the fortuity requirement as a fundamental element in insurance law).

68. *Id.*

coverage would not have occurred by chance.⁶⁹

The same basic principle applies to any analysis of sales commissions as a compensation method. It seems reasonable that if an employer chooses a compensation method that has the effect of transferring financial risks to employees, such employer must be willing to accept some limitation on discretionary activities that determine whether and to what extent its employees will be paid.

C. *Entrepreneurial Attributes*

Risk defines commission sales, but it also confuses the relationship between commission-earning employees and their employers, and stretches what it means to be an employee into other relational categories, most particularly “partnership.”⁷⁰ What all commission sales employees share, regardless of income level or professional status, is a position between two of capitalism’s major classifications.⁷¹ Because they are in it for a piece of the action, they are entrepreneurs.⁷² Because they are told what to do and

69. *Id.* See also *Rohm and Haas Co. v. Cont’l Cas. Co.* 781 A.2d 1172, 1184 (Pa. 2001) (Catille, J., dissenting) (describing the benefit of the carrier’s bargain as “insuring against the risk of an occurrence, not the certainty thereof”); Newkirk, *supra* note 66, at 828 (comparing bargain of insured to that of insurer vis-à-vis risk transfer).

70. As a result of the Supreme Court’s decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445–48 (2003), commentators have become interested in whether, under certain circumstances, it is fair to conclude that partners are in reality employees for purposes of coverage under discrimination laws. See e.g., Ann C. McGinley, *Functionality of Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3, 5–6 (2004). This Article, also advocating an economic realities approach to an employment law problem, considers the obverse proposition: whether it is not fair under certain circumstances to treat employees as partners for compensation purposes.

71. In traditional neoclassical economics, the three key factors of production are land, capital and labor. KEITH S. GLANCEY & RONALD W. MCQUAID, *ENTREPRENEURIAL ECONOMICS* 3 (2000). Entrepreneurs are usually associated with capital and employees, of course, with labor. Sales commission employees, it is argued, fall somewhere between the two.

72. Entrepreneurs are often described as individuals who both invest in businesses and run them. See 2 WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 855 (2d ed. 1956) (defining “entrepreneur” as “an employer in his character of one who assumes the risk and management of business”). Of course, sales employees do not manage the businesses for which they work. However, there are other descriptions of the entrepreneur that focus not on management but on the taking of risks. Schumpeter, for instance, did not think it essential that an entrepreneur own or manage something but rather that he or she be “enterprising.” JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* 74–75 (1961). Other observers have also tended to minimize the degree to which one must own something in order to be an entrepreneur. For instance, GLANCEY & MCQUAID, *supra* note 71 at 6, have noted: “[E]ntrepreneurship may be viewed as requiring the taking of calculated risks, and bearing the uncertainty in return for potential benefits, such as large profits. So a key entrepreneurial skill is calculating, managing and minimising

when to do it, they are employees.⁷³ They occupy, in other words, some middle realm, a hybrid of two dissimilar and in some ways contradictory economic categories.

Indeed, it is difficult to consider the recognized forms that partnerships take and not see kinship with commission sales. When parties agree to operate a business together and do not incorporate, the business is a general partnership.⁷⁴ When they team up for business purposes that are

[sic] this risk. . . ." Commission sales employees are entrepreneurial in the sense that they are enterprising risk takers.

73. See *Clackamas*, 538 U.S. at 449, (noting that control is the "touchstone" for determining whether individual is "employee"). Note, however, that a recurring theme throughout commission cases, particularly those involving individuals paid on a straight commission basis, is the question of whether such individuals are independent contractors or employees. Largely, courts treat the distinction, at least for purposes of liability, as irrelevant. (They should not treat it as irrelevant for purposes of damages because in those states where wage payment laws exist, remedies in addition to those available under contract law are available to prevailing plaintiffs). For instance, in *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1995), a case involving allegations of employment discrimination and wrongfully withheld commissions, the court did not address the employee/contractor question until after it had resolved the commission claims against the plaintiff and moved on to consideration of the discrimination claims. Then it noted in a footnote: "[Defendant] Norwalk argues on appeal that Gadsby was not an 'employee' protected by the ADEA. Because we find that Gadsby neither presented direct or circumstantial evidence of discrimination nor made out a prima facie case, we need not reach Norwalk's argument." *Id.* at 1330 n.2. Similarly, in *Willis v. Champlain Cable Corp.*, 748 P.2d 621 (1988), the court considered the effect of a thirty-day termination provision on an individual's right to post-termination commissions. There the court implied that the plaintiff was a contractor by noting that "[t]he plaintiff, [was] in business as a manufacturers' sales representative, and . . . represented manufacturers other than just the defendant." *Id.* at 748. However, the court never specifically called the plaintiff a contractor and utilized language throughout its opinion as if the distinction was irrelevant. It framed the issue in the case as follows: "If an employer, acting in accordance with the terms of the employment contract, terminates an employee's employment, does a cause of action nevertheless lie against the employer for recovery of sales commissions if the employee is able to establish that the employer was motivated by 'bad faith'?" *Id.* at 752. The question is whether the distinction between contractor and employee matters for purposes of the thesis here, namely, that employer opportunism under commission agreements should be restrainable by principles of fiduciary duty. A thorough treatment of the question, an article in its own right, is beyond the scope of this Article. What can be said is the case is more compelling for employees because of the wage payment laws, which do not typically cover the earnings of contractors. If the public policy of those states where there are wage payment statutes is the elimination of sharp wage payment practices, and if commissions are defined as wages, it seems then to follow that the public policy proscribes employer opportunism under sales commission agreements. That said, if the basis of a sales employer's fiduciary duty is that it acts on behalf of such employees while exercising discretion over their critical resources, there seems to be little justification to include employees and exclude commission-earning contractors.

74. See Uniform Partnership Act § 202 (1997) (explaining that "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership").

limited in scope or duration, such as the consummation of a single sale, and do not incorporate, the business is a joint venture.⁷⁵ When they team up but agree that at least one of the parties will run the business and at least one of the others will limit her or their involvement to investing in the business and participating in the profits, it is likely to be a limited partnership.⁷⁶ Adding commission sales to the chart seems to complete some kind of Linnaen⁷⁷ wheel: sales employees do not run the larger business but are responsible for, and thereafter participate in the profits of, individual deals.

III. WAGE COLLECTION LAWS

In most states, claims for overdue wages, whether based upon fixed wages or commissions,⁷⁸ are governed by wage collection statutes.⁷⁹ These laws embody an acknowledgement of the importance of predictable paychecks in the lives of working people⁸⁰ and contain meaningful disincentives for employers to withhold wages without just cause. Typically such laws require that wages be paid on a periodic basis, usually no less often than twice monthly.⁸¹ They also forbid withholdings not

75. See *Qayyum v. Morehouse Gen. Hosp.*, 874 So. 2d 371, 375 (La. App. 2004); *Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 375 (Iowa 1984) (noting that “a joint venture is defined as resulting from ‘the undertaking of two or more persons to combine their property or labor in the conduct of a particular line of trade or general business, for joint profits, creating the status of partnership’” (citation omitted)).

76. See Uniform Limited Partnership Act § 1 (1914) (“Limited Partnership defined. A limited partnership is a partnership formed by two or more persons under the provisions of § 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.”). The point is qualified by the word “likely” because limited partnership is not a default status. The business must register as a limited partnership in order to protect the limited partners from the claims of creditors. *Fujimoto v. Au*, 19 P.3d 699, 737 (Haw. 2001).

77. Referring to Carolus Linnaeus, the 18th century Swedish biologist, often called the father of taxonomy. He devised the standard system for naming, ranking, and classifying organisms still used, albeit in modified form, today.

78. Some states, for example Michigan, have separate statutes governing overdue commission claims. See MICH. COMP. LAWS § 600.2961 (1961). These laws do not provide substantive rights that are meaningfully different from wage payment laws that define wages to include sales commissions. For example, the Michigan law provides that “[t]he terms of the contract between the principal and sales representative shall determine when a commission becomes due.” MICH. COMP. LAWS § 600.2961(2) (1961).

79. See *Medex v. McCabe*, 811 A.2d 297, 304 (Md. 2002) (noting that 42 states have enacted wage payment laws).

80. See, e.g., *Prachasaisoradej v. Ralph’s Grocery Co., Inc.*, 18 Cal. Rptr. 3d 514, 522 (Cal. Ct. App. 2004) (noting that public policy implicit in wage payment law is prompt payment of wages); *Shaffer v. Ft. Henry Surgical Assoc., Inc.* 599 S.E.2d 876, 881 (W. Va. 2004) (noting that purpose of wage payment law is to protect working people by assisting them to collect wrongfully withheld wages). See also *infra* note 92 (describing legislative history of wage payment laws).

81. See, e.g., ILL. COMP. STAT. ANN. § 820.115/3 (West 1999) (“Every employer shall

required by law or authorized by employees, particularly set-offs,⁸² and require that an employee's last check be paid within a short time of her last day of employment, ranging from a few days⁸³ to a few weeks.⁸⁴ They penalize employers who violate the law by imposing a range of penalties, depending upon jurisdiction, including fines,⁸⁵ liquidated damages,⁸⁶ payment of the employee's attorneys fees,⁸⁷ criminal sanctions⁸⁸ and personal liability for shareholders, corporate managers and other persons who knowingly violate the wage payment laws.⁸⁹

What the wage collection laws do not do, however, is take sides in accrual disputes. They do not, in other words, provide employees with substantive rights, but rather with a statutory remedy when the employer has breached a contractual obligation to pay earned wages.⁹⁰ The theory is that the prospect of enhanced penalties will dissuade employers from

be required, at least semi-monthly, to pay every employee wages earned during the semi-monthly pay period."); W. VA. CODE ANN., § 21-5-3 (LexisNexis 2002) ("Every [employer] shall settle with its employees at least once in every two weeks").

82. See, e.g., IOWA CODE ANN. § 91A-5 (West 1996) (stating that employers may not deduct sums from wages unless authorized by law or by the employee); N.Y. LABOR LAW § 193 (McKinney 2000) (same).

83. See, e.g., WYO. STAT. ANN. § 27-4-104 (2005) (stating that employee must be paid all wages owed no later than five days after discharge or resignation).

84. See, e.g., N.J. STAT. ANN. 34:11-4.3 (West 2000) (explaining that final paycheck must be tendered "not later than the regular payday for the pay period during which the employee's termination . . . took place").

85. See, e.g., CONN. GEN. STAT. ANN. § 31-71g (West 2003) (describing fines for violation of wage payment laws ranging from \$200 to \$5,000).

86. See, e.g., DEL. CODE ANN. tit. 19 § 1103 (1995).

If an employer, without any reasonable grounds for dispute, fails to pay an employee wages, as required under this chapter, the employer shall, in addition, be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays. . . .

Id.

87. See, e.g., 43 PA. CONS. STAT. § 260.9a(f) (1992) (stating that court shall award reasonable attorneys' fees in addition to judgment for wages).

88. See, e.g., MASS. ANN. LAWS ch. 149 § 150 (LexisNexis 1999) (describing criminal sanctions for failing to pay wages).

89. See, e.g., KAN. STAT. ANN., § 44-323(b) (2000) (stating that "any officer thereof or any agent having the management of the corporation who knowingly permits the corporation to engage in such violation [of the wage payment laws] shall be deemed the employer for purposes of this act").

90. See *Shortt v. New Milford Police Dep't*, 562 A.2d 7, 14 (Conn. 1989) (noting that wage payment law "does not embody substantive standards to determine the amount of wages that are payable but provides penalties in order to deter employers from deferring wage payments once they have accrued"); *Harding v. Duquesne Light Co.*, 882 F.Supp. 422, 427-28 (W.D. Pa. 1995) (noting that the Pennsylvania wage payment law "does not create a statutory right to wages; rather, 'it provides a statutory remedy when the employer breaches a contractual right to earned wages.' It is the employment agreement between the parties that controls in determining whether earned wages are due" (citation omitted)).

engaging in sharp payment practices.⁹¹ The scheme appears to work quite well in the area of fixed wages where liability questions are rare and deterrence is a simple matter of increasing the costs of non-compliance. It is a less successful strategy when applied to the commission context, where accrual disputes are common and enforcement less a question of available remedies and more a question of available rights.⁹²

Contract, as the source of accrual rights for sales commission employees, is problematic for two reasons. The first is that commission agreements simply cannot be prepared carefully enough to account for every contingency. The sale of a product or service is an extremely complex undertaking, requiring cooperation and integration across the

91. See *Shortt*, 562 A.2d at 13 (noting that penalties of wage payment law deter wrongful withholding of wages); *Ressler v. Jones Motor Co.*, 487 A.2d 424 (Pa. Super. Ct. 1985).

The policy of the statute is to aid an employee [sic] in the prompt collection of compensation due him and to discourage an employer from using a position of economic superiority as a lever to dissuade an employee [sic] from promptly collecting his agreed compensation. . . . The smaller the amount of the unpaid compensation the greater is the need for assistance in effecting collection.

Id. at 429 (quoting *State ex rel. Nilsen v. Oregon State Motor Ass'n.*, 432 P.2d 512, 515 (1967)).

92. Accrual disputes in the fixed compensation setting are very rare outside of disputes that concern non-wage forms of compensation, such as accrued vacation and holiday pay, which are also defined as "wages" under most wage payment laws. See, e.g., *Harding*, 882 F.Supp at 425 (pursuing a claim for vacation pay under Pennsylvania wage payment law); *Holmes v. Unified School Dist. No. 259*, 46 P.3d 1158, 1161 (Kan. 2002) (concerning accrual dispute over holiday pay under Kansas wage payment law). Accrual disputes over wages are rare because, as noted earlier in this Article, there are seldom serious questions about whether the employee was or was not at work. There are few defenses to wage claims if the employee was at work and the amount of the agreed-upon wage is seldom a point of disagreement. Accrual disputes in the commission area are extremely common and come in an infinite variety of fact patterns. Some of the general categories are: disputes over whether the employee has met all of the conditions precedent to a commission, see, e.g., *Thompson v. Direct Impact Co.*, 63 F.Supp. 2d 721 (E.D. Va. 1998) (holding ambiguous a commission agreement that provided that commission only earned when revenue from sale is collected during employee's employment); conflicts between employees over commissions, see, e.g., *Petronella ex rel Richardson v. Combined Ins. Co. of Am.*, No. CV 940544040S, 1997 Conn. Super. LEXIS 2753 at *1 (Conn. Super. Ct. Oct. 9, 1997) (providing an example where a manager argued that she, and not her subordinate, is entitled to a commission); whether employers may unilaterally amend commission agreements to make them less lucrative to their employee, see, e.g., *Barlow v. M.J. Waterman & Assoc., Inc.*, No. 206929, 2000 WL 33418958 (Mich. Ct. App. May 30, 2000) (discussing an employer who unilaterally changed his method for paying commissions); and whether and to what extent employees are entitled to be paid commissions that accrue after termination, see, e.g., *Finsterwald-Maiden v. AAA S. Cent. Ohio*, 685 N.E.2d 786 (Ohio Ct. App. 1996) (explaining that an employer may not rely upon post-employment commissions limitation contained, not within commission agreement, but within employee handbook specifically stating that it is not to be construed as contract).

entire spectrum of an organization's management and operations structure.⁹³ If the product is poorly made, often delivered late or too expensive, it will be hard to sell.⁹⁴ When it is sold, it is often difficult to ascribe a procuring cause, it not infrequently being the case that numerous individuals contributed to the effort, some employed on a commission basis, some not, or that dumb luck was the causative factor.⁹⁵ It is literally impossible to draft an agreement that will cover each possible circumstance under which it is reasonable to make an adjustment, up, down, or sideways,⁹⁶ particularly if the object is to be fair to all parties.

The second problem is that as a source of substantive rights, contract law is poorly suited to the protection of interests that emanate from the employment relationship because of the enormous weight and influence of the at will rule. Because of the at-will rule, courts accept opportunism as the employer's birthright, even when the agreement concerns matters other than job security. When a literal interpretation of a commission agreement would permit an employer to treat an employee unfairly the result is simply unfair in the way that at-will determinations are often unfair, regrettable but not actionable.⁹⁷ When a gap or ambiguity in a commission agreement causes uncertainty, presumably providing the court with greater leeway to do what is fair, what it often does instead is conclude that the employer intended to reserve its traditional prerogatives.⁹⁸

The problem with literalist interpretations of unambiguous contracts is that such interpretations often fail to consider that the agreements may be

93. STANTON & BUSKIRK, *supra* note 48, at 11–13 (noting that the successful marketing of a product requires coordination across all corporate departments).

94. *Id.* at 297–98.

Compensation should be based only on those items that are controllable by the salesmen and can be measured. However meritorious, this step is an ideal and virtually impossible to implement completely. . . . Most factors contributing to sales success are controllable only partially or not at all by the salesman. A salesperson has some control over his sales volume, for instance, but this control is limited by product attributes and company pricing policies. A man may have considerable control of his missionary sales work, but the quality of the point-of-purchase promotional materials are not controllable by him; yet, they affect his success.

Id.

95. A recurring problem is how to contend with windfall sales generating undeserved commissions. Beyond advising that adjustments be made, the sales compensation literature is very lean on concrete proposals for suitable contract language. *See, e.g.*, DUNN, JOHNSON & KURTZ, *supra* note 64 at 422. (“An essential element for any sales compensation plan is equity. The plan must be fair to both the company and its salesmen. The company should be able to keep selling costs in line with volume. The compensation plan should also protect against windfall gains to salesmen in abnormal times.”).

96. “Sideways” is meant as an adjustment of commissions between employees.

97. *See supra* note 34 and accompanying text.

98. *See supra* note 33 and accompanying text.

illusory or unconscionable. When a court begins its analysis of a so-called "clear" contract by describing the at-will rule, effectively nothing that it describes thereafter can be illusory or unconscionable because the court has accepted, as a matter bedrock principle, that the employee has no right to expect anything other than bad faith and ill treatment.⁹⁹ When courts utilize the at-will rule to interpret unclear contracts, the effect is even more pernicious.¹⁰⁰ Accrual disputes usually involve unclear contracts (drafted by employers) and challenges to an employer's common law prerogatives. When a court uses the at-will rule as an interpretative device to ascertain the meaning of a commission agreement, circularity is created: the employer's common law prerogatives are used as a guide for determining how such prerogatives have been altered by contract. In those jurisdictions where that sort of circularity has become entrenched in the case law, there are no incentives to draft clear agreements and little incentive to pay commissions that are at all susceptible to challenge.

One such jurisdiction is New York, where courts have recognized something called the "post-discharge commissions rule." That rule provides that "[a]n at-will sales representative is entitled to post-discharge commissions 'only if the parties expressly provided for such compensation.'"¹⁰¹ Operation of the rule is illustrated by the court's holding in *Swits v. New York Systems Exchange, Inc.*¹⁰² In *Swits*, the plaintiff was a sales employee who was terminated from her job leasing computer equipment. Her commission agreement required the employer to pay her commissions on all leases and lease extensions, with no express limit on the number or duration of lease extensions from a single client.

99. See, e.g., *Willis v. Champlain Cable Corp.*, 748 P.2d 621, 627 (Wash. 1988) (noting, after an extended homage to the at-will rule, that "[w]e also would decline to modify the express terms of a written contract agreed to by competent parties. This case raises no implications of overreaching, unconscionability or illegality"). The court might have felt differently had it approached the problem by worrying that the employee had invested a substantial amount of time wooing one potential customer, only to have the rug pulled out on him before the deal was consummated. Such would be the case under partnership law, where a clause that permitted the partnership to expel a partner on thirty days notice would likely be enforceable but a provision that allowed the partnership to divest an expelled partner of his interest in a big business deal would not be. See *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 576 (N.Y. 1977) (noting that expulsion clauses in partnership agreements are enforceable so long as they do not effect forfeiture).

100. The effect is more pernicious because the clear meaning of the contract is hidden. At least it can be argued that by following the text of an unfair contract, the employer did nothing of which the employee was not aware of nor reasonably placed upon notice about.

101. *Swits v. N.Y. Sys. Exch., Inc.*, 722 N.Y.S.2d 300, 302 (N.Y. App. Div. 2001) (quoting *Production Prod. Co. v. Vision Corp.*, 706 N.Y.S.2d 289 (N.Y. App. Div. 2000)). See also *Frishberg v. Esprit De Corp.*, 778 F.Supp. 793, 803 (S.D.N.Y. 1991) (citing relevant New York cases on post-termination commissions rule).

102. *Swits*, 722 N.Y.S.2d at 302.

The plaintiff was discharged and sought commissions for lease extensions that were placed with her clients after her dismissal.

Summary judgment was entered in favor of the employer, and the plaintiff appealed. The appellate court affirmed. Although the appellate court's opinion suggests that the plaintiff possessed extrinsic evidence that might bear on the intent of the parties with regard to post-termination commissions,¹⁰³ the court viewed such evidence as irrelevant because it was not expressly within the commission agreement itself. In the absence of such express language to the contrary, the court held, the post-termination commissions rule is "dispositive."¹⁰⁴

The irony, of course, is that by the express language of the agreement, the right to commissions did not expire upon the termination of the plaintiff's employment. What the New York rule presumes is that within the context of a relationship terminable at will, no rational employer would fail to exercise its prerogative to stop paying commissions at the moment the employee's services were terminated.¹⁰⁵ The onus is therefore shifted to the employee to establish by unmistakable terms that the agreement contemplated an action on the employer's part that was not in keeping with its common law prerogatives.

By using the at-will rule as an interpretative device in commission disputes, courts misapply the default rule for job security rights to the resolution of wage claims, thus limiting the ability to contest an employer's exercise of discretion as unjust or contrary to the probable intent of a commission agreement. Furthermore, courts create an end-point to the

103. *Id.* (describing the plaintiff arguing that the parol evidence of the intent of the parties should be permitted to defeat the employer's motion for summary judgment).

104. *Id.* at 302 ("[S]ince . . . [the post-termination commission rule] is dispositive, it is unnecessary to address either the parol evidence or Statue of Frauds issues.").

105. The post-discharge commission rule in New York is of early origins. In one of its first explications, *Scott v. Eng'g News Pub. Co.*, 62 N.Y.S. 609, 610 (N.Y. App. Div. 1900), the court suggested that when an at-will employment ends, it is far fetched to think of future orders as belonging to the terminated salesman because it is tantamount to repudiation of the at will rule.

If the plaintiff is right, then these customers were perpetually his, and they could never, in any contemplated business relation to the defendant, get away from him. He would have more than a life enjoyment with respect to business emanating from them to the defendant; for the right to commissions, as now claimed, would upon his death undoubtedly go to his legal representatives.

Id. Along the way courts began to suggest that the rule could be altered by contract, although no evidence can be found that this had been done to the satisfaction of any court. An early example of a court presuming that the rule could be amended by contract is *Pelletier v. Dobbins-Trinity Coal, Inc.*, 59 N.Y.S.2d 676, 676 (N.Y. App. Div. 1945), which, in the inimitable style of the New York appellate courts, is a one-sentence opinion: "In a hiring at will plaintiff is not entitled to commissions on deliveries made subsequent to the date of his discharge, in the absence of the showing of any agreement as to such commissions."

collection of commissions that, while perhaps sensible in the fixed wage context, is both artificial and extremely unfair given the manner in which commission earnings accrue.¹⁰⁶ And finally, courts fail to fulfill the public policy that supports facilitation of all wage claims, contingent or fixed.¹⁰⁷

Two published decisions, *Yearwood v. Southern Life Systems, Inc.*¹⁰⁸ and *Gadsby v. Norwalk Furniture Corp.*,¹⁰⁹ are particularly illustrative of the phenomenon that has been described, and these cases provide templates for consideration of solutions that are proposed in the concluding sections of this paper.

IV. TWO CASES

In *Yearwood*, the plaintiff was a commission sales employee who sold reusable thermometers to hospitals and other health care providers. The "product" was actually composed of two items: the thermometer itself and a disposable probe cover, which was purchased on an after-market basis. Customers bought the thermometer on contracts, called SPAs (System Placement Agreements), that required the customers to buy the disposable probe covers for up to five years. The SPAs also required the employer to provide the customer with certain follow-up services such as training and product maintenance.

The plaintiff's commission agreement was described by the court as follows:

The commission agreements provided that district managers who sold thermometers under SPAs would receive commissions from Southern in two ways. For the customer's initial purchase of the thermometers and entry into the SPA, a manager received a commission of 30 percent of the company's gross profit. For disposable probe covers sold to the customer during the term of the SPA, another commission of between 28 percent and 32 percent of gross profits was payable. Under the commission agreements, commissions were due on the fifteenth of each

106. Compare, for example, with the default in partnership: "[a] partner has been held entitled to his proportionate share of the net profits realized on the completion of projects which were commenced or planned prior to the dissolution of the partnership, including commissions payable to the partnership for its services despite their accrual after dissolution." *Wellington Sys., Inc. v. Redding Group, Inc.*, 714 A.2d 21, 32, (Conn. App. Ct. 1998) (citing 59A AM. JUR. 2D Partnership § 1034 (1987)).

107. See *supra* note 73, where the following syllogism is offered: If the public policy of the states where there are wage payment laws is the elimination of sharp wage payment practices, and if commissions are defined as wages in such laws, it follows that the public policy in wage payment states is the restraint of employer opportunism under sales commission agreements.

108. 531 S.E.2d 741 (Ga. Ct. App. 2000)

109. 71 F.3d 1324 (7th Cir. 1996).

month based on “items paid by customers” through the end of the previous month. The agreements also provided that “this plan can be modified at any time by the corporation.”¹¹⁰

During the plaintiff’s employment, his employer sold all of the SPAs to a third party for \$1,550,000. Because of this sale, plaintiff was discharged and told that his right to receive commission payments on future sales of probe covers was extinguished. The plaintiff sued in Georgia State Court on a conversion theory, alleging “entitlement to a pro rata share of the proceeds from the sale of the accounts.”¹¹¹ The trial court granted the employer’s motion for summary judgment.

On appeal, the Georgia Court of Appeals framed the issue as one involving straightforward at-will principles. Was the plaintiff seeking payment for something he sold or something he hoped to sell in the future? If his claim was for commission credit for something he already sold, it would be based upon services rendered and thus cognizable as a wage payment claim. If, however, the claim sought credit for something that plaintiff had yet to sell, if, in other words, the probe covers were not “sold” upon the execution of the SPAs, the claim would be tantamount to an assertion that plaintiff was entitled to provide future services, a notion barred by the employment at will rule.¹¹²

The court held that the claim was for future services and thus affirmed the judgment of the lower court. In reaching its conclusion, the court relied upon two of the employer’s past practices. The first was its practice of transferring employees away from accounts that they had originated and only paying commissions on probe covers to the sales employee assigned to the account at any given time, regardless of whether such employee sold the thermometer in the first place. The second was that “district managers who left the company did not thereafter receive commission payments.”¹¹³ Because the plaintiff acknowledged during his deposition that he was aware of those practices, the court ruled that he sought payment for services to be performed in the future and was thus barred from proceeding

110. *Yearwood*, 531 S.E.2d. at 742.

111. *Id.* at 742

112. *Id.* at 742–43.

113. *Id.* at 743. The court’s complete analysis is as follows:

Yearwood’s deposition testimony shows that the commission were earned based on future services. His testimony establishes that commissions on sales of the covers were paid to the district manager who serviced the account even if that person did not originate the account. Moreover, Yearwood acknowledged that . . . [sales employees] who left the company’s employ did not thereafter received commission payments. Consequently, Yearwood has no entitlement to commissions based on the sale of covers after his employment ended. Therefore, Southern has no liability to Yearwood for unpaid commissions.

with his case by the at-will rule.¹¹⁴

The opinion demonstrates the trap that is set for employees when courts use the at-will rule as a principle of contract interpretation in commission disputes. Yes, future cover orders were contingent upon additional services to be provided by the employer. And yes, by selling the long-term contracts en masse, the employer extinguished any ability employees might have to be assigned to an account when the sales were made. But how could it ever be said that the employee had no interest in future commissions at the moment the long-term contracts were sold to a third party? All of the contracts were obtained by the employer through the efforts of commission sales employees, each of whom expected to receive commissions on future sales. Even if the employer correctly interpreted its commission agreements to allow it to reassign employees from account to account, what remained unchanged was the employer's promise to pay commissions to *someone*. By selling the cover contracts to a third party, the employer avoided paying commissions to anyone, thereby reaping the benefits of a commission driven sales force while avoiding its concomitant costs.

The opinion also illustrates the degree of deference afforded to employer discretion on matters that affect the ability of employees to earn commissions. The commission agreement was obviously silent on two questions: First, could the employer reassign employees away from accounts in which they had sold the SPAs? In other words, could employees be deprived of commissions from sale of the probe covers if they had sold the thermometer? Second, could the employer deprive employees of probe cover commissions after such employees were terminated?¹¹⁵ The court based its conclusion that the employer could do such things on the fact that it had done them, an absurdly circular bit of reasoning and an example of how pernicious the at-will principle can be when applied to commission disputes.¹¹⁶

114. The court does not precisely explain why it viewed the admissions as dispositive. The only logical conclusion is that it accepted the following syllogism: (1) the employer does not pay commissions to employees who leave its employment and reserves the right to move employees between accounts; (2) plaintiff knew about these practices; ergo (3) plaintiff should have known that he did not earn commissions on cover sales until such orders were placed by customers he was servicing at the time of the sale.

115. That conclusion may be surmised by the court's description of the agreement. It notes that "[t]he commission agreements provided that district managers who sold thermometers under SPAs would receive commissions in two ways," and then goes on to describe the thermometer sale and the after-market sales of probe covers. *Id.* at 742. It is submitted that if the agreement specifically permitted the employer to reassign employees away from accounts that they initiated, or expressly stated that commission would not be paid post-termination, the court would have viewed those details as significant enough to describe.

116. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981) (noting that

In *Gadsby v. Norwalk Furniture Corp.*,¹¹⁷ the defendant was a furniture manufacturer and the plaintiff its only salesman in the Chicago area. The facts suggest that the plaintiff was incredibly successful: between 1984 when he was hired and 1990 when he was discharged he increased annual sales in his territory from \$779,000 to \$4,800,000.¹¹⁸ By written agreement, he received a straight 5% commission on all revenue allocated to his territory, meaning that starting at a modest salary of some \$35,000, he built his position into one that paid him well over \$200,000 per year.¹¹⁹ The agreement allowed either party to cancel it upon thirty days notice. The job itself did not require the plaintiff to sell furniture. Rather, it was his job to convince retailers to allocate floor space to the product so that it could be seen and ordered by retail customers. Such customers would order the furniture directly from the retail store, the retail store would order the furniture from plaintiff's employer and plaintiff would be paid his commissions on the tenth day of the month after the furniture was shipped. As acknowledged by the court, once plaintiff procured the retail space, his job was mostly complete.¹²⁰

In 1990, the employer exercised the thirty-day termination provision. The employer's explanation for the termination was that the plaintiff "had a problem with disclosing confidential information," had a poor working relationship with a major client and had an abrasive personality.¹²¹ The plaintiff sued on a number of theories, including age discrimination, breach of contract, promissory estoppel, restitution and

"where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement"). The *Yearwood* opinion is silent on the question of whether any employee ever objected to the practice of not paying post-termination commissions or moving employees away from the income stream created by the initial sale of the thermometer. Assuming that there was no evidence of such objections, it is not fair to describe the past practice and course of performance evidence as determinative. First, current employees would not have had a meaningful opportunity to object to a company's post-termination policy until they were dismissed. As such, it is not reasonable to hold such silence against the employee who filed suit in *Yearwood*. Second, the plaintiff in *Yearwood* might not have objected to the practice of moving employees away from the income stream created by thermometer sales because it did not happen to him or because he was moved to accounts that were equally lucrative or beneficial. In any event, because the earlier moves were to something, and the move created by the sale of accounts was to nothing, it is hardly fair to conclude that the plaintiff acquiesced in the practice that resulted in his termination.

117. 71 F.3d 1324, 1326 (7th Cir. 1996).

118. *Id.*

119. *Id.* The court reports his income in 1990 as \$235,000.

120. *Id.* The court described the selling effort as follows: "The salesman's job was mainly complete once he had procured the floor space and placed the samples at the retail store." *Id.*

121. *Id.*

interference with prospective economic advantage. All of the claims were dismissed by the trial court on the employer's motion for summary judgment, a result that was subsequently affirmed by the Seventh Circuit Court of Appeals.

The breach of contract claim largely turned on interpretation of the thirty-day termination provision.¹²² The provision contemplated five possible reasons for termination and described the employer's obligation to pay post-termination commissions given each possibility. The court described these provisions as follows:

1. Termination due to Gadsby's reaching age 70: commissions paid 'on all orders entered prior to the date of such termination.'
2. Termination due to Gadsby's death or insolvency or bankruptcy: commissions paid 'on all orders which have been entered on the books of the Company prior to such termination. . . .'
3. Termination due to Gadsby's disability or incapacity: commissions paid 'on all orders which have been entered on the books of the Company during the period of disability or incapacity. . . .'
4. Termination due to Gadsby's resignation: commissions paid 'only on orders shipped.'
5. Termination by Norwalk: commissions paid 'on all orders entered.'¹²³

The plaintiff argued that because he was terminated in accordance with paragraph five, he was entitled to commissions as long as the floor space he placed continued to generate orders. He based this argument on the plain wording of the provision and a comparison of it to the others. Specifically, he noted that while the first three provisions contained cutoff dates for post-termination commissions, the fifth did not. As such, the agreement evidenced the parties' intent that commissions would continue to be paid on an on-going basis.¹²⁴

The court rejected that argument for three reasons. First, it noted that "absent express language to contrary, a contract would not subject an

122. The plaintiff also alleged that he was entitled to commissions in accordance with the so-called "procuring cause" doctrine. That doctrine provides that "in absence of a contrary agreement, an agent is entitled to compensation from his principal for a transaction of which the agent is the procuring cause." *Id.* at 1327. The *Gadsby* court held that the doctrine was inapplicable there because the contract at issue contained a mechanism for payment of commissions, and the procuring cause doctrine does not apply when the agreement between the parties expressly provides for when commission will be paid. *Id.*

123. *Id.* at 1328 (internal citations omitted).

124. *Id.*

employer to liability *ad infinitum*.”¹²⁵ Second, it found plaintiff’s interpretation of the contract unpersuasive because it ignored important clues to intent that could be derived from the contract’s structure.

[T]he first three types of terminations are contained in separate paragraphs, but the last two—termination by the company and by Gadsby—are contained in a single paragraph, Paragraph (f), which is immediately preceded by the provision that allows termination with 30 days’ notice. Thus Paragraph (e) tells the parties how to terminate the Contract and Paragraph (f) tells the parties how such a termination will affect commissions:

(e). . . Either party to this agreement may terminate the same, without reason, upon thirty (30) days’ written notice in writing to the other party.

(f) That if this agreement is terminated by resignation of the Commission Sales Representative, the Company shall pay commissions when and as earned only on orders shipped; if this agreement is terminated by the Company, the Company shall pay commissions when and as earned on all orders entered.

Read together, the absence of an express cutoff date in Paragraph (f), unlike Paragraphs (g), (h), and (i), is perfectly understandable: the cutoff date naturally flows from the 30-day notice provision in the previous paragraph. After each clause in Paragraph (f), the words ‘during the 30-day period prior to termination’ is understood.¹²⁶

Additionally, the court noted that “Gadsby’s argument makes the express distinction in Paragraph (f) between ‘orders shipped’ and ‘orders entered’ superfluous.”¹²⁷ Because, by Gadsby’s logic, the employer may not limit post-termination commissions for employees who either resign or are terminated, why distinguish between orders that are shipped and those that are entered? The distinction only makes sense if tied to a cutoff date, e.g., orders shipped *within* thirty days of termination or orders entered *within* thirty days of termination.¹²⁸

And finally, the court noted that the plaintiff’s interpretation simply fails to explain why the Contract would have been drafted to be more generous to a sales representative who quits or is fired than to one who retires, dies or experiences a disability. Common sense dictates that an employment contract would, more likely

125. *Id.*

126. *Id.* at 1328–29.

127. *Id.* at 1329.

128. *Id.*

than not, treat terminated employees and employees who quit more harshly than those who discontinue their relationship with the employer due to circumstances beyond their control.¹²⁹

The facts in *Gadsby* suggest that a commission sales employee built a wildly successful territory, which, after it was built, could largely run itself. The court suggested that the employer became disenchanted with the sales employee, but did not deem it necessary to explore the bases for that disenchantment.¹³⁰ It did not deem it necessary, in other words, to point out the obvious, which is that it would be very easy to become disenchanted with an employee who is paid over \$200,000 per year to do little or no work. Over time, there is simply no chance that the employer did not view the commissions it was paying as a burden to it and a windfall to the employee.¹³¹ There is little chance that it had not spent considerable time

129. *Id.*

130. The court described defendant's view of plaintiff's performance as follows:

There is substantial evidence that Norwalk was pleased with Gadsby's performance until his termination in 1990, including increasingly high rankings among Norwalk's salesmen and handwritten compliments from management. Nonetheless, Norwalk claims that Gadsby lacked a good working relationship with Smithe Furniture Company, a major Chicago account, and that Gadsby had a problem with disclosing confidential information. Norwalk also claims that Gadsby had an abrasive personality.

Id. at 1326.

The court's only evaluation of the employer's justification for the dismissal came in two footnotes. In note 4, the court observes: "Gadsby's phenomenally high sales figures for the Chicago area are almost entirely due to a single client: in 1990, of the \$4,800,000 in total sales, \$4,268,106 was to Smithe Furniture." *Id.* at 1332. Then in note 5, the court observes: "[t]he fact that such a high percentage of Gadsby's sales were to a single customer, . . . makes his souring relationship with that customer a valid consideration for his termination and helps to demonstrate why Gadsby's behavior in 1990, rather than 1989, is so critical." *Id.* at 1333. Fair enough. But we are not told how the relationship soured and whether the souring affected the amount of orders received by the employer through Smithe furniture. The last point is the most significant because if the plaintiff's conduct did not cause the employer to lose business, what the employer gains by dismissing the plaintiff is a four million dollar account, for which it no longer must pay a salesman's commissions. Under the theory of sales commission agreements advocated in this Article, the employer would be free to terminate the sales employee in accordance with the at will rule as modified or not by the agreement between the parties. What it would not be able to do is what it was able to do here, both discharge the employee and deprive him of commissions earned prior to termination.

131. The best evidence of this is that over five years after the plaintiff's discharge, when the court was describing the facts in its written decision, it noted that "there is no evidence that [the plaintiff's] responsibilities were shifted to or absorbed by other Norwalk sales representatives." *Id.* at 1332. The fact that the plaintiff could not establish that he was replaced was a problem for him with regard to his age discrimination claim; it led the court to find that he failed to establish a *prima facie* case of age discrimination. *Id.* at 1333. However, it is damning evidence that the employer acted opportunistically; it simply did not need anyone to do what the plaintiff had done, and was content to keep the client for itself.

and money planning its exit strategy before it actually terminated the plaintiff's employment.

Gadsby is another example of a court applying a "post-termination commission" presumption.¹³² The court establishes at the very beginning of its analysis the measure by which the plaintiff's claim will be judged: "absent express language to the contrary, a contract would not subject an employer to potential liability *ad infinitum*."¹³³ From that point, it was a rather simple matter for the court to derive support for the defendant's position from the structure of the contract. The agreement contemplated five possible ways in which the contract could be terminated: (1) employee reaching age seventy, (2) employee's death or bankruptcy, (3) employee's incapacity, (4) employee's resignation and (5) employee's involuntary termination. The first three described precisely how post-termination commissions would be handled; the last two did not. However, the last two provisions were preceded by a paragraph that either party could terminate the agreement upon 30 days notice to the other. *Ipsa facto* the cutoff for commissions "naturally flows from the thirty-day notice provision in the previous paragraph."¹³⁴

It is submitted that the flow would not have seemed so natural had the court applied an inherently less hostile rule of construction. Assume, for example, that the post-termination commission rule was the converse of the one applied by the court, to the effect that agreements that do not expressly state that commissions cease upon termination of employment are deemed to provide for continuation of commissions in accordance with the original understanding of the parties.¹³⁵ Under such a rule, the "natural" construction of the contract would have required the court to accept that the 30-day provision only answered the question of how much notice the parties were required to give each other if they wished to terminate their relationship, not whether the employer remained liable for post-termination commissions. When the notice provision is read in conjunction with the last two termination provisions, the contract clearly provides that the employer must give *Gadsby* thirty days notice if it wished to terminate their relationship and thereafter pay him on all orders entered from his territory.

What is important to point out here is that one party was getting everything and one party was getting nothing. The court's holding seems satisfying on some level, no doubt because of the sense that *Gadsby* had

It would certainly be a different case if the employee's accounts, and his huge commission earnings, were shifted to another employee.

132. See discussion of *Swits v. New York Systems Exchange, Inc.*, *supra* Part III.

133. See *Gadsby*, 71 F.3d at 1328.

134. *Id.*

135. As it would be, for instance, under partnership law, see *Wellington Sys., Inc. v. Redding Group, Inc.*, 714 A.2d 21, 32 (Conn. App. Ct. 1998) (considering the termination of a partnership agreement).

lived long enough off the fat of the land. But this is a value judgment based strictly on one's acceptance of the at-will principle as the final arbiter of such disputes. Why, for instance, is it more sensible that a corporation be permitted to fill orders without paying commissions *ad infinitum* and wrong somehow for an employee to collect the commissions long after his discharge? Also, how well does the opinion in *Gadsby* work if the employee cannot be dismissed as a glutton? Instead of firing him after years of making \$200,000 per year for little work, the employer could have terminated him after he had toiled for years in penury and finally landed a big account.¹³⁶ The holding in *Gadsby* must stand on its application of the rules of contract construction, not whether it is "fair" to one or the other of the parties.

III. FIDUCIARY DUTIES

There has been a great deal of scholarship over the years on how fiduciary duties are both created and distinguished from other obligations, most notably those emanating from and limited by contract.¹³⁷ There is little dispute on the basics: contract duties are created and defined by the understanding between the parties; fiduciary duties are broader and are formed when, by contract or otherwise, weaker parties place trust in stronger parties with respect to things of value.¹³⁸ Beyond what may be described as the general rule is a world of observed phenomena comprised of exceptions. For instance, some relationships of trust between weaker and stronger parties are not deemed by courts to be fiduciary, as for example the relationship between franchisor and franchisee.¹³⁹ There are also examples of courts imposing the duty on the weaker party, not the

136. See *Willis v. Champlain Cable Corp.*, 748 P.2d 621 (Wash. 1988). In *Willis*, the Supreme Court of Washington upheld just such a result. There, a sales employee was instrumental in landing a big account. Before the new customer placed its first commissionable order, the employer exercised its right under the commission agreement to terminate the employee and the right to commissions upon thirty days notice. For an extended discussion of *Willis*, see *infra* Part VII.

137. See generally, Smith, *supra* note 35, at 1421-31 (describing various attempts to rationalize the law of fiduciary duty and provide insights into how fiduciary relationships are created and distinguished from non-fiduciary relationships).

138. *Id.* at 1487-88 (describing differences between contract duties and those emanating from contract). See also Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1684 (1990) (noting that "[a] fiduciary relationship is a relationship of power and dependency in which the dependent party relies upon the power holder to conduct some aspect of a dependent's life over which the power holder has been given and accepted responsibility.")

139. See Smith, *supra* note 35, at 1479-80 (discussing franchises and franchise agreements).

stronger.¹⁴⁰ Scholars have endeavored to create more nuanced theories for fiduciary duties; theories that do a better job of explaining how fiduciary duties are formed and how they are distinguished from obligations of a non-fiduciary character.¹⁴¹

Professor D. Gordon Smith proposes one such theory in an article entitled "The Critical Resource Theory of Fiduciary Duty."¹⁴² According to Professor Smith, fiduciary relationships across the entire spectrum of commercial and non-commercial settings within which they arise can be said to share three attributes: (1) discretion reposed in one who (2) acts on behalf of another (3) respecting a critical resource.¹⁴³ The theory is particularly instructive here for three reasons. First, it purports to be predictive in the case of relationships that meet the three criteria but fall outside of established categories.¹⁴⁴ Second, it helps to assign value to contingent interests without requiring that such interests rise to the level of "property," at least as that term is traditionally defined.¹⁴⁵ Finally, it helps to explain why commission agreements give rise to fiduciary duties and other wage contracts do not.

The three elements of the theory require some elaboration. Professor Smith describes a critical resource as something belonging to another, whether or not the thing "owned" can be categorized as "property."

The 'owner' of critical resources need not have legally enforceable rights in the same way that an owner of property has such rights, but she must have residual control rights that, at a minimum, provide practical control over the resources. For example, a lawyer's client may not have property rights in the confidential information conveyed to the lawyer, but the client nevertheless controls the initial disclosure of that information.¹⁴⁶

The key to whether a thing can be described as a critical resource is not a function of its intrinsic or extrinsic value but whether it "provides the fiduciary with the occasion to act opportunistically."¹⁴⁷ When a fiduciary can harm the "owner" of the resource by misusing it, it is a critical resource.¹⁴⁸

140. *Id.* at 1469–71 (arguing that although venture capitalists ordinarily have more power than the entrepreneurs who accept their money, gaps in agreements between them create opportunities for entrepreneurs to act opportunistically, which opportunism should be subject to restraint by fiduciary duty).

141. *Id.* at 1421–31.

142. See Smith, *supra* note 35.

143. *Id.* at 1402.

144. *Id.* at 1404.

145. *Id.* at 1403.

146. *Id.* at 1444.

147. *Id.*

148. *Id.*

The discretion requirement measures the ability of the fiduciary to cause harm to the “owner” of a critical resource. It is not enough that harm be possible in the abstract; the fiduciary must have the “power to use or work with the critical resource in a manner that exposes the beneficiary to harm that cannot reasonably be evaded through self-help.”¹⁴⁹ The degree of a fiduciary’s power to use or work with the critical resource must reside somewhere along the continuum between absolute and insignificant.¹⁵⁰ If the power is absolute, then the allocation of discretion is a conveyance and the beneficiary no longer an “owner.”¹⁵¹ On the other end of the spectrum, if the power is insubstantial, then the beneficiary cannot be said to be exposed to harm, at least not a level of harm that cannot be reasonably evaded through self-help.¹⁵²

The “on behalf of” requirement is the most abstract.¹⁵³ According to Professor Smith, the requirement is clearly met when the fiduciary represents the beneficiary in dealings with third parties or when the fiduciary acts upon instructions received from the beneficiary, but such examples do not constitute the only circumstances justifying a finding that the requirement has been met.¹⁵⁴ Indeed, as Professor Smith concedes, “relationships of every kind are formed in the hopes of conveying mutual benefits,” and “the most interesting behavior occurs in the absence of explicit instructions.”¹⁵⁵ The key appears to be the understanding, whether

149. *Id.* at 1449.

150. *Id.* at 1448–49.

151. *Id.*

152. *Id.*

153. The “on behalf of” requirement is the most abstract because it is less intuitive than the others and harder to reconcile with observed phenomena. It is largely derived from the law of agency. *See* RESTATEMENT (SECOND) OF AGENCY § 13 cmt. a (1958) (defining a fiduciary as “a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking”). The partnership example demonstrates how abstract the standard is. As Professor Robert W. Hillman notes, if fiduciaries must act “primarily for the interest of another,” partners are not fiduciaries. Robert W. Hillman, *Business Partners as Fiduciaries: Reflections on the Limits of Doctrine*, 22 CARDOZO L. REV. 51, 55 (2000). That is because partnerships are formed by individuals hoping to realize individual gain. *See id.*

Assume, for example, a venture has a dollar of income to be allocated between its two owners. May one owner claim a larger percentage, or even any percentage at all, without doing violence to the notion of partner as fiduciary? May the other partner resist the first partner’s claim without running afoul of the same fiduciary norms? These questions, of course, are rhetorical but do illustrate the problem of applying a ‘selfless’ standard in a context where the pursuit of private advantage not only is inevitable but, within limits, should also be encouraged.

Id. at 55–56.

154. Smith, *supra* note 35, at 1439.

155. *Id.*

or not stated explicitly, that the putative fiduciary has assumed an obligation on behalf of one who may therefore claim to be a beneficiary and thus insist that the fiduciary refrain from self-interested behavior that causes her harm.¹⁵⁶ In the absence of an assumed obligation, the law does not interpose a broad duty to refrain from self-interested behavior and leaves the parties to whatever self-help remedies exist, such as withdrawal from the venture or litigation.

As an example of a relationship that meets all of the requirements of fiduciary status save the “on behalf of” requirement, Professor Smith points to the relationship between licensor and an exclusive licensee.¹⁵⁷ While the individual obtaining an exclusive license may exercise discretion with regard to a critical resource, such licensee does nothing on behalf of the licensor.¹⁵⁸ As such, the parties have an arms length relationship that is governed by the terms of their contract and policed by their ability to engage in self-help.¹⁵⁹

The relationship between an employer and a sales commission employee fits neatly into Professor Smith’s conception of relationships that are fiduciary. The critical resource, of course, is the employee’s contingent interest in sales commissions. That interest meets the test for critical resource, not because the employee has a property right to a commission that has yet to accrue, but, consistent with Professor Smith’s theory,

156. This appears to be a fair synopsis of the requirement, but it is never put so directly by Professor Smith. Apparently stumped by the riddle posed by Professor Hillman, *see* Hillman, *supra* note 153, Professor Smith is content to provide examples of when the “on behalf of” requirement will and will not be met (not met by arm’s length contracts; is met by employees who would steal business secrets), and does not attempt to provide a solution to the problem in the abstract. Smith, *supra* note 35, at 1438–41. That solution appears to come from one of Professor Smith’s other observations:

The critical resource theory unifies fiduciary law behind the notion that all fiduciary relationships conform to the structure described above, namely, that the fiduciary acts on behalf of the beneficiary when exercising discretion with respect to a critical resource belonging to the beneficiary. Moreover, the critical resource theory holds that the purpose of fiduciary duty is to combat opportunism in such relationships. When combined, these insights imply that the content of fiduciary duty should depend on the potential for opportunism, which in turn depends on various aspects of the relationship structure. *The implication is that courts should calibrate fiduciary duties to the fit the situation before them.*

Id. at 1482 (emphasis added). So, too, it is argued, should they calibrate the showing required for a finding that a putative fiduciary acts “on behalf of” a putative beneficiary. Viewed thus, partners act on behalf of other partners situationally. For instance, a partner may have self-interested motives for forming a partnership but acts on behalf of the partnership when representing it in her dealings with third parties.

157. Smith, *supra* note 35, at 1440.

158. *Id.*

159. *Id.*

because of the harm that the employer could visit upon the employee through opportunistic behavior.¹⁶⁰ That harm is illustrated by the plight of the plaintiffs in *Yearwood* and *Gadsby*. The employer can simply refuse to pay, thereby divesting the employee of the resource entirely.

The employer also exercises discretion over the innumerable variables that determine whether the employee ever reaps the benefit of her resource. On the extreme end of the spectrum, the employer can utilize its discretion to discharge the employee or sell her accounts, as the employers did in *Yearwood* and *Gadsby*. Moving beyond discretionary acts that cause immediate and rather obvious harm, however, are countless business and administrative decisions that, while perhaps less visibly injurious to the resource, affect the probabilities associated with commissions earnings, decisions such as those related to quotas, commission rates, territory size, customer credit, intra-firm conflict, account staffing and so on.¹⁶¹ What is important to observe is that few of those decisions, large or small, are subject to meaningful challenge by affected employees.¹⁶² Or, as Professor Smith would put it, few offer employees viable self-help alternatives.¹⁶³

And finally, the relationship between employers and sales commission employees meets the somewhat abstract "acting on behalf of" requirement. It must be conceded, however, that if the analysis founders, it founders here. That is because employers do not act on behalf of sales employees in the most obvious sense of that term, as would, for example, an attorney on behalf of a client. Indeed, Professor Smith, referring to "employees" generically and probably only thinking of the job security question, pronounced that employers qua employers would not qualify as fiduciaries:

160. See *id.* at 1444 (noting that a critical resource need not be property but belong to the beneficiary in the sense that the beneficiary will be harmed by opportunistic misuse of the resource).

161. Trade publications that describe the process of administering commission plans make the point. See e.g., *Sales Management and Compensation Evolve in Competitive Marketplace*, *Hewitt Study Shows*; *Talent Management Tops the List of Hot Issues in Sales Industry*, BUSINESS WIRE, June 19, 2001 (describing a study of 224 large employers of sales employees that found that employers used a variety of methods for establishing sales quotas and 56% of them adjusted their quotas during the year); David Felder, *Should You Adjust Your Sales Compensation?: Sagging Economy May Cause Some HR Professionals to Reconsider Pay Programs for Sales Personnel—Agenda: Compensation and Benefits*, HR MAGAZINE, Feb. 2002 (quoting compensation consultant who argues that companies should take advantage of sagging economy to change terms and conditions of incentive plans).

162. See *Willis v. Champlain Cable Corp.*, 748 P.2d 621, 624 (Wash. 1988) (noting that an employer's interest in running his business "as he sees fit" outweighs an employee's interest in job security).

163. Smith, *supra* note 35, at 1483 (noting that "[fiduciary duty] law provides protection against opportunistic behavior, and the strength of that protection varies inversely with the potential for self-help on the part of the vulnerable party").

The critical resource theory of fiduciary duty rejects the notion that employers should owe fiduciary duties to employees. If the relevant resource is 'human capital,' there is no reason (in the usual case) to suspect that an employer exercises discretion over that resource *on behalf of* the employee. Like the landlord-tenant case discussed above, this relationship meets the 'discretion' requirement and the 'critical resource' requirement, but not the 'on behalf of' requirement.¹⁶⁴

It is by no means clear that Professor Smith would view the relationship between employers and sales commission employees quite the same. That is because unlike the relationship between an employer and an employee paid on a time basis, particularly when the resource at issue is job tenure, there is a strong argument that employers act on behalf of sales employees with regard to the contingent interest in sales commissions. The argument has two layers. The more obvious of the two observes that employers collect money on behalf of those who are paid commissions. Employees who work on a commission basis are assured a percentage of the revenue or profit associated with a transaction or series of transactions.¹⁶⁵ However, they have no right to collect their "share" directly from customers. Instead, they must rely upon their employers to send the bills, collect the proceeds, and divvy the monies properly. Under fiduciary duty law, money collecting is a classic "on behalf of" responsibility, undoubtedly because of the entruster's extreme vulnerability to opportunism.¹⁶⁶

The second layer observes that strictly on the question of the "on behalf of" requirement, there are no fundamental differences¹⁶⁷ between the

164. *Id.* at 1456–57.

165. See BELCHER, *supra* note 2, at 311.

166. See *People v. Leonard*, 430 N.Y.S.2d 4, 4 (N.Y. App. Div. 1980) (noting that lawyer acts in fiduciary capacity when collecting money for client); *Am. Express v. Rossi*, 4 Pa. D. & C.2d 760, 761–62 (Pa. C.P. 1955) (noting that fiduciary duty was created by trust agreement in which parties selling money orders would account to issuer for sums collected); *Starnes v. Texas*, 929 S.W.2d 135, 137 (Tex. App. 1996) (holding that "[a]ppellant's obligation to collect the money from each night's bingo game and deposit the money fits both the legal and lay definition of a fiduciary function"). Money collecting is often deemed a fiduciary obligation by statute. See *Blumberg v. Coronet Ins. Co.*, 112 B.R. 236, 241 (Bankr. N.D. Ill. 1990) (describing Illinois statute providing that "any money which an insurance producer . . . receives . . . for soliciting, negotiating, [or] effecting . . . policies of insurance shall be held in a fiduciary capacity"); *Abuteir v. Texas*, No. 03-00-00162-CV, 2000 WL 1784352, at *2 (Tex. App. 2000) (noting that under Texas statutes, "a fiduciary relationship exists between the State, as principal, and [a] corporation, as agent, for tax money that the corporation collects on behalf of the State").

167. There are, of course, differences in scope. In the course of running his business, it cannot be said that everything the business owner does is done "on behalf of" his sales employees. By contrast, it is arguably true that everything a partner does is done on behalf of the partnership and his co-partners.

way in which an employer of sales employees acts on behalf of such employees and a partner acts on behalf of a partnership and her co-partners. As Professor Smith notes, "The critical resource theory of fiduciary duty describes the structure of relationships in which courts apply fiduciary [duty] law. Partnerships fit easily within that structure, and courts predictably impose fiduciary duties in the partnership context."¹⁶⁸ How, then, does a partner act "on behalf of" a partnership?

The answer evokes some controversy. There are those who argue that the only way that a partner acts on behalf of a partnership and her co-partners is by exposing them to joint and several liabilities.¹⁶⁹ To such observers, it is the harm that can be caused by the partner vis-à-vis third parties that justifies the imposition of fiduciary duties.

Under the critical resource theory of fiduciary duty, the strict duties imposed in partnerships imply that partners are highly vulnerable and incapable of adequate self-help. The source of this vulnerability may be that partners have unlimited personal liability for obligations of the partnership. This distinguishes partners from shareholders in a corporation, whose liability is limited.¹⁷⁰

The advantage to the "unlimited liability" or "mutual agency" argument is that it is tangible and accounts for self-interest in partnerships.¹⁷¹ The problem with describing partners as acting on behalf of the partnership and co-partners is that it is fairer to state that partners primarily act on behalf of themselves.¹⁷² The unlimited liability argument solves that problem by pointing out that while partners are ordinarily self-interested, their ability to expose others to harm means that they must be charged with representing the organization and co-partners who will be jointly and severally responsible for their actions.¹⁷³ Of course, if the unlimited liability theory is correct, the employers of sales employees are not fiduciaries because sales employees are not subject to joint and several liabilities.

But it is not a satisfying explanation, for at least two reasons. First, it fails to explain why courts have imposed fiduciary obligations on

168. Smith, *supra* note 35, at 1458.

169. This is sometimes referred to as the "mutual agency" rationale. See J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry Into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29, 43 (1995) (noting that "[m]utual agency creates a relationship of trust and confidence. . . because . . . [a] partner, as general agent, is entrusted with powers to commit fellow partners to courses of action that sometimes involve the risk of major liability and the commitment of substantial resources").

170. Smith, *supra* note 35, at 1484.

171. Hillman, *supra* note 153, at 55-56.

172. *Id.*

173. *Id.*

shareholders in closely-held corporations and on members of limited liability companies.¹⁷⁴ Such individuals tend to interact like partners but do not face unlimited responsibility for one another's actions.¹⁷⁵ Second, it fails to explain the scope of a partner's fiduciary obligations. Fiduciary duty in the partnership context is a two-fold responsibility: a duty of care and a duty of loyalty.¹⁷⁶ The unlimited liability theory explains why partners owe one another a duty of care, i.e., care to not cause third party liabilities,¹⁷⁷ but not why they must be loyal, i.e., the obligation to be "other regarding."¹⁷⁸ The loyalty obligation suggests that third party liability is only part of the story.¹⁷⁹ The other part, it is argued, has something to do with the protection of a partner's reasonable expectations in the partnership as a business investment.

Such is the insight of the so-called "morale mandate" explanation for the imposition of fiduciary duty in partnerships. The concept has been explained by Professor Robert W. Hillman:

The moral mandate approach promotes virtuous conduct in business relationships. It is sometimes embraced without stated justification, apparently on the theory that the reasons for

174. See, e.g., *Donahue v. Rodd Electrotype Co. of New Eng.*, 328 N.E.2d 505 (Mass. 1975).

[B]ecause of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another.

Id. at 515.

175. *Id.* See also Hillman, *supra* note 153, at 51–52 (noting that although joint and several liability might justify a higher fiduciary standard for partners than for shareholders, "[o]n the whole, however, the reasons for distinguishing fiduciary duties based on associational form have not proven compelling").

176. See Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Restraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1622 (2004) (noting that "[i]n both partnership and corporate law, fiduciary duties generally include both a duty of care and a duty of loyalty").

177. *Id.* (noting that "[t]he duty of care is generally regarded as the duty to be attentive and informed before making a decision that affects the corporation").

178. See Smith, *supra* note 35, at 1406–07 (noting that duty of loyalty is a duty of "unselfishness" or to behave as if one "has adopted an *other-regarding preference function*").

179. It seems obvious that the duty of care has more to do with third party liability than does the duty of loyalty. See Donald J. Weidner, *Foreward to Freedom of Contract and Fiduciary Duty: Organizing the Internal Relations of the Unincorporated Firm*, 54 WASH. & LEE L. REV. 389, 392 (1997) (presenting synopsis of papers delivered at symposium, and describing the views of Professor J. Dennis Hynes as including the belief that "third-party liability is relevant to the duty of care, but not to the duty of loyalty, which turns on denial of a benefit and on opportunistic seizure of assets, not on exposure to liabilities").

promoting good conduct and punishing bad behavior are too obvious to require articulation. Often, however, reasons are in fact advanced. Most commonly, the moral mandate view is justified along utilitarian lines as a necessary means of promoting trust, an essential component of successful long-term business relationships. On other occasions, support for the view is found in the potential for inequity when bargaining power is unequal and there is a need to prevent exploitation of co-owners who are without power and trapped in unhappy business relationships.¹⁸⁰

Combining the two explanations described by Professor Hillman seems to provide the best answer: power is often unequally distributed, sometimes on a situational basis,¹⁸¹ and partners must be able trust one another if the business is to succeed. Fiduciary duty, specifically the duty of loyalty, is imposed to restrain partners from acting opportunistically as they fulfill their acting "on behalf of" responsibilities.¹⁸²

A hypothetical helps to illustrate how partners act on behalf of other partners and also how employers act on behalf of commission sales employees. Consider the typical problem of an overdue receivable. A partnership might delegate the responsibility to collect the debt to a particular partner. In the usual case, a failure to aggressively pursue an overdue invoice would not result in liability to the collecting partner, even if the collector's defalcation caused cash flow problems for the enterprise.¹⁸³ If the collector let the debt go long enough, and if debtor subsequently became insolvent, there might be a plausible argument that the collector had breached her duty of care.¹⁸⁴ No one would be claiming that the collector acted disloyally.

Contrast that hypothetical with the case of a collector with a reason to

180. Hillman, *supra* note 153, at 54–55.

181. By "situational," it is meant that partnership duties must often be divided among partners, and when partners are performing specific partnership functions, they are in a position of situational superiority over those who must rely upon their skills and good will. That differentiation of responsibilities is at the core of theoretical conceptions of "the firm." According to Ronald Coase and other theorists, firms form in order to save money on transaction costs. See Smith, *supra* note 35, at 1432–38 (discussing the firm theories argued by Coase, Williamson, and others). Fiduciary duty arises in such settings because human beings are naturally opportunistic and operating agreements cannot be drawn carefully enough to restrain such behavior. *Id.* at 1433–38.

182. Professor Smith is not to the contrary. See *id.* at 1407 ("[F]iduciary duty' connotes an obligation to *refrain from self-interested behavior that constitutes a wrong to the beneficiary as a result of the fiduciary exercising discretion with respect to the beneficiary's critical resources.*").

183. See Miller, *supra* note 176, at 1623 (noting that the duty of care applicable to the conduct of decision makers, whether such decision makers are members of LLCs, directors of corporations or general partners, requires a finding of gross negligence or willful misconduct before such decision makers will be exposed to individual liability).

184. *Id.* at 1621–28.

refrain from collecting, as for instance the imminent withdrawal from the business of a partner and the ability of the collector to seize the withdrawing partner's individual share. In that case the equation would be quite different, mostly because of how we feel about the collector's opportunism. The point is twofold. First, we would say that collector was acting on behalf of the beneficiary with regard to the receivable thus justifying the imposition of a duty. And second, it would not matter whether the beneficiary was a partner or sales commission employee. In either case we would view the collector as acting on behalf of the beneficiary and causing injury through self-interested behavior.

The critical resource theory helps to explain why commission agreements give rise to fiduciary duties while other wage contracts do not. An interest in time-based wages is certainly a critical resource: an employer could cause a great deal of harm to employees by refusing to pay them. However, time-based wage agreements fail the discretion test. As noted previously, if the employee was at work and at least going through the motions of providing services, wages are due without regard to the quality of such services or their objective or subjective usefulness.¹⁸⁵ Almost nothing about the process is open to the employer's ex post manipulation. Furthermore, opportunities for self-help are manifest. The national scheme of wage payment laws requires prompt, cash payment of wages and penalizes those employers who violate its mandates quite harshly.¹⁸⁶

Time-based wage agreements also fail the "on behalf of" test—at least for employees. They do not fail the test for employers. Employees act on behalf of employers, and thus the courts have recognized that employees owe their employers a duty of loyalty that restrains them from opportunistic behavior during the employment relationship.¹⁸⁷ The argument that employers act on behalf of employees, at least in the usual case, is difficult to support by application of mainstream conceptions of what it means to be employed.¹⁸⁸

185. See *supra* note 56 and accompanying text.

186. See *supra* note 22 and accompanying text.

187. See Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 685 (1993) ("All employees owe a fiduciary duty of loyalty to their employer—be the employer a sole proprietor, a partnership, a close corporation, or a large, publicly traded corporation. No reciprocal duty of loyalty, however, runs from the employer to its employees.").

188. But see Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1242 (1991) (arguing that the firm-specific investments made by employees justifies conclusion that enterprise exists as much for them as for shareholders); Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 48 (1991) (arguing that as human capital investors in the firms for which they work, employees should be entitled to protection against restructuring decisions that

V. SCOPE OF THE DUTY: THE PARTNERSHIP PARADIGM

As noted, partners owe fiduciary duties to co-partners and to their partnerships. The classic description¹⁸⁹ of that duty is Benjamin Cardozo's:

Joint adventurers, like copartners, owe to one another . . . the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior.¹⁹⁰

The extent to which Judge Cardozo's soaring rhetoric is or in fact ever was a correct statement of law is unclear.¹⁹¹ For many years, lawyers, judges and scholars have debated what the pretty language means "on the ground."¹⁹² Opinion has tended to fall into two camps. The so-called libertarians, also called contractarians, argue that Cardozo simply had it wrong, that partnerships are not trusts but private contractual relationships entered into by individuals who are able to take care of themselves.¹⁹³ Viewed thus, fiduciary duty is not an obligation that transcends the understanding between the parties but an attempt to estimate what the parties would have agreed to had they appreciated *ex ante* what divides them *ex post*. According to Judge Easterbrook and Professor Fischel,

When the task is complex, when efforts will span a substantial time, . . . a detailed contract would be silly. When one party hires the other's knowledge and expertise, there is not much they can

threaten such investments). Such views have not influenced courts. Despite the fact that both articles cited in this note have been around for more than a decade, neither appears to have been cited by a single court.

189. The postmodern description, not to the contrary of Cardozo's, is provided by David Mamet: "'Hey . . . ' No, fuck that, you just listen what I'm going to say: your partner *depends* on you. Your partner . . . a man who's your 'partner' *depends* on you . . . you have to go *with* him and *for* him . . . or you're shit, you're shit, you can't exist alone." DAVID MAMET, GLENGARRY GLEN ROSS 98 (1982).

190. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

191. Compare Hillman, *supra* note 153, at 53 (noting that "Meinhard has aged well"), with John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 658 (1995) (describing Judge Cardozo's description of fiduciary duty in *Meinhard* as "rhetorical excess" and chiding "indignant" courts that follow it without pausing to consider "whether the underlying deal supports the level of fiduciary obligation that the court invokes").

192. For descriptions of the debate between contractarians and anti-contractarians, see McGinley, *supra* note 70, at 43-47; Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 16-21 (1993); Hynes, *supra* note 169, at 31-38.

193. See McGinley, *supra* note 70, at 43-44 (describing the proponents of free contract as "libertarians" and "contractarians").

write down. . . . A fiduciary relation is a contractual one characterized by unusually high costs of specification and monitoring. The duty of loyalty replaces detailed contractual terms.¹⁹⁴

Judge Posner has expressed similar views:

The concept of the duty of good faith like the concept of fiduciary duty is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute. The parties want to minimize the costs of performance. To the extent that a doctrine of good faith designed to do this by reducing defensive expenditures is a reasonable measure to this end, interpolating it into the contract advances the parties' joint goal.¹⁹⁵

To contractarians, fiduciary duties are default rules, and when they conflict with express provisions in the operating agreement, the contract ought to control.¹⁹⁶

Anti-contractarians, called parentalists by some,¹⁹⁷ argue that fiduciary duties owed by partners should be both broad and non-waivable.¹⁹⁸ In the view of such individuals, all partners are not alike, and by allowing associating entrepreneurs to opt out of fiduciary duties, the law favors partners with bargaining power over those without it, and favors those with comparatively greater access to information over those who rely upon the sophistication and good will of their joint adventurers.¹⁹⁹

The Revised Uniform Partnership Act (RUPA) was approved by the membership of the American Law Institute in 1995.²⁰⁰ In it, a compromise was attempted between the views of contractarians and anti-contractarians.²⁰¹ First, the accountability rule from the much older Uniform Partnership Act (UPA)²⁰² was incorporated into RUPA verbatim:

194. See Langbein, *supra* note 191, at 657–58 (quoting Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426–27 (1993)).

195. *Mkt. St. Assoc. v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991).

196. See Weidner & Larson, *supra* note 192, at 27 (noting that the libertarian approach favors freedom of contract and fiduciary duties as merely default rules).

197. *Id.* (referring to anti-contractarians as “parentalists”).

198. See McGinley, *supra* note 70, at 43–45 (discussing the views of anti-contractarians).

199. See Hynes, *supra* note 169, at 43–46 (discussing the concerns expressed by those favoring broad, non-waivable fiduciary duties).

200. See McGinley, *supra* note 70, at 43 (noting that American Law Institute approved RUPA in 1995).

201. See Weidner & Larson, *supra* note 193, at 18 (describing RUPA’s fiduciary duty sections as a compromise “on an extraordinarily controversial topic”).

202. For a history of the Uniform Partnership Act, see *Wheeler v. Hurdman*, 825 F.2d 257, 267 n. 19 (10th Cir. 1987) (describing the fact that work began on the UPA in 1902, it was completed in 1914, and it was adopted by forty-eight states and the District of Columbia by 1984).

Section 21: Partner Accountable as Fiduciary

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.²⁰³

Second, however, was the incorporation of two rules that had not been in UPA.²⁰⁴ The first provided that a partnership agreement may not “eliminate the duty of loyalty,” “but the partners by agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable.”²⁰⁵ The second provided that the partnership agreement may not eliminate the obligation of good faith and fair dealing, “but the partners by agreement may determine the standards by which the performance of the obligation is measured, if the standards are not manifestly unreasonable.”²⁰⁶

Together the sections described above establish the boundaries of permissible self-interest for those who choose, by design or default, the partnership form. The underlying requirement is that parties be both fair and loyal. Those broad principles may be modified by agreement, but only to the point that they are not manifestly unreasonable. The onus, therefore, is placed upon the partner claiming a greater share than might be expected by operation of the default to incorporate her expectations into the operating agreement, or accept *de novo* review by a court.²⁰⁷ Even when partners have the bargaining leverage or relative sophistication to impose one-sided terms or conditions, such actions are subject to challenge under the rubric of manifest unreasonableness.

It is possible to argue that RUPA constitutes a contractarian victory or an anti-contractarian victory,²⁰⁸ a debate that need not be joined in this paper. What is argued here is that RUPA’s fiduciary rules constitute a

203. Uniform Partnership Act § 21 (1997).

204. See Weiner & Larson, *supra* note 193, at 18 (describing the fiduciary duty sections of the RUPA).

205. Revised Uniform Partnership Act § 404(b) (2004).

206. Revised Uniform Partnership Act § 404(c) (2004).

207. See Richard A. Booth, *Fiduciary Duty, Contract, and Waiver in Partnerships and Limited Liability Companies*, 1 J. SMALL & EMERGING BUS. L. 55, 61 (1997) (arguing that the RUPA’s fiduciary rules place the burden on those who wish to retain the right to act self-interestedly to obtain specific waivers from would-be partners).

208. Compare McGinley, *supra* note 70, at 45 (implying the contractarians won as “there is no question that RUPA increased the ability of partners to contract out of certain fiduciary responsibilities”) with Hynes, *supra* note 169, at 31 (implying that contractarians did not win because “RUPA endorses too great an invasion of the principle of freedom of contract among partners”) and Weiner & Larson, *supra* note 193, at 28 (stating that “[p]erhaps the fact that neither extreme is satisfied fully indicates a balanced approach that legislators will recognize as a reasonable compromise on a difficult issue”).

sensible and efficacious model for restraining employer opportunism under sales commission agreements. It is a sensible model because it is the product of a century's worth of considered judgment on how best to police opportunism when operating agreements cannot be drawn broadly or carefully enough, when remuneration is delayed and when investors must rely upon the good faith and loyalty of co-adventurers.²⁰⁹ Of course, one could argue that the standard does not go far enough and that too much authority will continue to reside with employers at the drafting stage of the relationship when those with greater bargaining power and access to information do a good deal of their mischief.²¹⁰ Sticking for the moment with the "sensible" part of the prospectus, it seems that there are at least two reasons to favor the RUPA approach.

First, should consensus ever develop around the idea that sales commissions are different than other wages, and thus entitled to greater (or at least different) protections than they are afforded at present, it can be anticipated that opinion will divide into contractarian and anti-contractarian elements, much as it has in other business settings.²¹¹ Accepting RUPA as the standard cuts to the chase, as it were, and perhaps makes the fiduciary duty argument more palatable to those who could otherwise be counted on to oppose it.²¹²

209. By describing RUPA as considered judgment, it is not suggested that it constitutes consensus. To the contrary, the legal literature on RUPA is almost universally gloomy and pessimistic. See, e.g., Allan W. Vestal, *Advancing the Search for Compromise: A Response to Professor Hynes*, 58 LAW & CONTEMP. PROBS. 55 (1995) (describing the unhappiness of both camps with RUPA). But see Booth, *supra* note 207, at 55 (describing RUPA as "eminently sound"). RUPA is, however, a compromise, and as Edmund Burke said of such things: "all government—indeed, every human benefit and enjoyment, every virtue and prudent act—is founded on compromise and barter." Edmund Burke, Speech on Conciliation of America (Mar. 22, 1775) (transcript available in the University of Pennsylvania Law School Library).

210. See Mara Kent, "Forced" v. Compulsory Arbitration of Civil Rights Claims, 23 LAW & INEQ. 95, 115 (noting that the inequality of bargaining power between employer and employee is particularly acute in the pre-contract phase, when the employer "holds all the cards").

211. It is of course important to point out that the contractarian debate is not limited to partnership law. It arose in the more general corporate law context and appears to divide scholars whenever the relationship between associating entrepreneurs becomes topical. See McGinley, *supra* note 70, at 44–45 (discussing the genesis of the contractarian debate); Timothy L. Fort and Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829, 831–32 (2000) (describing the history of the contractarian debate as consuming a substantial portion of the twentieth century and featuring the views of "corporate theorists as to whether a corporation should be considered a natural entity with responsibilities for its stakeholders or a web resulting from a nexus of contracts among self-interested individuals").

212. In other words, the same argument is made here that was made by Dean Weidner. See Weidner & Larson, *supra* note 193, at 28 (observing that "[p]erhaps the fact that neither extreme is satisfied fully indicates a balanced approach that legislators will recognize as a

Second, while it is fair to observe that sales employees on average have less access to information and less bargaining leverage than partners—thus perhaps justifying imposition of a broader duty of loyalty²¹³—there is also a countervailing sense that commissions are more a creature of contract than are partnership profits (wages being the return on investment expected by employees and profits being the return on investment expected by partners). Under partnership law, the presumption is that all partners share in profits equally, but this presumption can be altered by contract.²¹⁴ There is no presumption governing how much to pay in commissions, and if there is a parallel to the partnership default rule concerning profits, it is that the wage payment laws express the policy choice that the amount of commissions to pay be left to the agreement between the parties.²¹⁵ Thus, more deference should be applied to the interpretation of the terms of a commission agreement, express or implied, than to analogous provisions of a partnership agreement, and if the relative lack of power of sales employees suggests that fiduciary duties be broader under sales commission agreements than under partnership agreements, the policy choice that employers not be told how much to pay in commissions pushes the matter back the other way. RUPA emerges as the middle course.

Which brings the argument to the question of efficacy. The RUPA standard would provide employers with wide berth to establish commission accrual mechanisms, subject only to the condition that they not be manifestly unreasonable and thus a violation of fiduciary duty. However, it would also reform the law in two ways that would be of incalculable value to sales employees. First, it would effectively switch the default rule from compensation at will to fiduciary duty,²¹⁶ meaning that employer opportunism would no longer enjoy protected status, and unclear agreements would no longer be interpreted as if employers intended to preserve their tradition prerogatives. And, second, a standard of unconscionability would emerge for evaluating clear agreements that would serve as a counterbalance to pre-contractual opportunism.

reasonable compromise on a difficult issue”).

213. See Kent, *supra* note 210, at 115 (noting that bargaining power is unequal between employees and employers, especially pre-contract).

214. Uniform Partnership Act, § 7(4) (1997) (“The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. . .”).

215. See *supra* note 29 (describing the policy of the wage payment laws as supporting the right to recovery of wages that have accrued, not to recover any sum in particular).

216. Switching the default rule from employment at will to something else is not a new idea. See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 109 (2002) (arguing that because of “endowment effect,” switching default in employment law from employment at will to just cause may result in additional rights for employees, questioning so-called Coase theorem).

It is not possible to catalog every application or ramification of a rule that has not been adopted by any legislature and does appear to have been considered by a single court.²¹⁷ Some of its applications are considered by revisiting the *Yearwood*²¹⁸ and *Gadsby*²¹⁹ cases.

VI. TWO CASES—REDUX

Yearwood can be described as having involved three discretionary acts on the part of the employer. The first was its practice of transferring employees away from the income stream created by after-market sales of probe covers.²²⁰ The second was its practice of not paying employees commissions on probe cover sales after such employees were terminated.²²¹ And the third was its decision to sell all of the SAP accounts to a third party.²²²

Taking them in reverse order, there can be little doubt that under the principle of law advocated here, the bulk sale of the SAP contracts, without accounting for commissions, would be a prohibited action. That is because by analogy to partnership law, the attempt by the fiduciary to claim such a deal for itself would be viewed as the usurpation of an “opportunity”²²³ and

217. A fair question to ask is whether this Article seeks legislation or a reform to the common law. The answer, perhaps not surprisingly, is either. RUPA's fiduciary duty sections could be revised a bit and then readily incorporated into wage payment laws. Beyond that, RUPA's fiduciary duty sections could be used by courts analogously. The phrase “manifestly unreasonable” contained within RUPA was borrowed from the Uniform Commercial Code, where it is used in a number places. Hynes, *supra* note 169, at 52. Courts have frequently applied the Uniform Commercial Code in non-code cases when it has been helpful to do so. See, e.g., *New Eng. Yacht Sales Inc., Comm'n of Revenue Serv.*, 504 A.2d 506, 509 (1986) (observing that the Court has “on a number of occasions . . . looked to the Uniform Commercial Code as a fruitful source of analogy.”); *Bd. of Managers of the Vill. Ctr. Condo. Ass'n, v. Wilmette Partners*, 760 N.E.2d 976, 980 (2001) (describing non-code analogy to UCC). RUPA language, borrowed from the UCC, would be easy to borrow again. Also, partnership law itself has a long history of being borrowed, under circumstances very much akin to the way in which it is suggested that RUPA be used here. See, e.g., *Donahue v. Rodd Electrottype Co. of New Eng.*, 328 N.E.2d 505 (1975) (applying fiduciary law derived from partnership to close corporations).

218. *Yearwood v. Southern Life Systems, Inc.*, 531 S.E.2d 741 (Ga. Ct. App. 2000).

219. *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1996).

220. *Yearwood*, 531 S.E.2d at 741.

221. *Id.*

222. *Id.*

223. The “opportunity” concept is not limited to partnerships, but is applied in most business settings where access to information and property is entrusted to fiduciaries who are in a position to act opportunistically. See Victor Brudney & Robert Charles Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 998 (1981) (noting that the opportunity doctrine “provides that corporate fiduciaries cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation”); see also Kenneth J. Mickieqicz & C. Forbes Sargent, III, *Demoulas v. Demoulas Super Markets, Inc.: Directors' and Shareholders' Duty of Loyalty in Self-*

a violation (again by analogy) of the UPA's most basic conception of fiduciary duty: the obligation to account to other partners for transactions and property belonging to the partnership.²²⁴ Obviously the "opportunity" concept would be far narrower in the sales setting than it is under general partnership law. The presumption in partnership law is that all partners participate in profits equally.²²⁵ Hence, in the absence of agreement to the contrary, a partner need not have direct involvement in a money-making transaction in order to expect payment of her commensurate share of the profits.²²⁶ As long as a deal falls within the line of a partnership's business interests, it will belong to the partnership and proportionate to equity, to the partners themselves.²²⁷ Sales employees, by contrast, only reasonably expect to be paid on business for which they are responsible. Thus opportunity, in the sense of a property interest in the revenues generated by a business deal, is logically limited in the sales context to deals for which the sales employee would have a reasonable expectation of earning a commission.

So qualified, opportunity is a very useful way to evaluate the employer's conduct in *Yearwood*. As an employment law problem, the bulk sale question was awkward and difficult, for at least two distinct reasons. First, it required the court to grapple with the thorny issue of past versus future: If services were left to be provided under the SAPs before a commission was earned, how could money be awarded to the employees without a finding that they had a right to job security?²²⁸ Second, the bulk sale was in essence the sale of a business, or at least part of a business. How could the court find for the plaintiff without finding, at least implicitly, that the employees had become owners—that at-will service had evolved over time into something akin to an equity interest in the

Dealing Transactions Involving Corporate Opportunity, 42 BOSTON B.J. 16, 16–17 (1998) (noting that opportunity doctrine is rooted in the duty of loyalty and the principle that fiduciaries must subordinate individual interests to the well-being of the enterprise).

224. See UPA Section 21. See also Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215, 262 (2004) (noting that Section 21 is a "proscription against self-dealing" and the UPA's "central duty of loyalty provision").

225. See *supra* note 215 and accompanying text (discussing partnership law).

226. See *supra* note 106 (discussing default presumptions in partnership law).

227. *Id.*

228. The court did not describe the issue as "thorny," "difficult," or even "interesting." Rather, it viewed it as black and white: If the claim was for wages for work to be done in the future, it was barred by the at will rule. If it was for wages for work performed in the past, it was cognizable as a wage claim. *Yearwood v. Southern Life Systems, Inc.*, 531 S.E.2d 741, 743 (Ga. Ct. App. 2000). By describing what "the court" was forced to grapple with, it is not meant that the *Yearwood* court grappled with any such thing. Rather, what is visualized is a court that ultimately ruled the way the *Yearwood* court ruled but began the process (given the sympathetic nature of his claims) hoping to rule in plaintiff's favor.

company?²²⁹

It would be hard to find a more simple opportunity problem, which carries none of employment law's baggage concerning the future or the concept of sweat equity.²³⁰ The employer obtained all of the SPAs upon promises to pay probe cover commissions to someone. It then sold the opportunity to service those contracts to a third party, thereby pocketing the present value of that future right without paying commissions. In summary, it usurped a business deal rightly belonging, pro rata, to all of the sales employees who helped to create it—a problem with a name and a solution under partnership law but of an uncertain status under employment law.

The second discretionary act on the employer's part was its refusal to pay commissions accruing after termination. Such a practice, certainly in the absence of a clear agreement authorizing it, would be a breach of fiduciary duty under partnership law²³¹ and a breach of fiduciary duty under the rule envisioned here. The more difficult question is whether clear agreements purporting to incorporate the so-called post-termination commissions rule would or should be enforceable. Undoubtedly the question would engender controversy.²³² Contractarians would argue for the enforcement of agreements as written and anti-contractarians would argue for the recognition of rules designed to protect employees from

229. Again, this is a description of a hypothetical court concerned about justice for the plaintiff, yet troubled by the ramifications of a decision in plaintiff's favor; it is not necessarily the *Yearwood* court itself. Indeed, the evidence that the *Yearwood* court actually reflected on the philosophical issues raised by the case is dubious. For instance, it first describes Mr. Yearwood's claim as seeking an entitlement to "a pro rata share of the proceeds from the sale of the accounts." *Id.* at 742. Later in the opinion it recasts the claim: "[A] question does arise about whether [the employer] breached its contractual obligation to pay the commissions by selling the SPAs without obligating the purchaser to continue commission payments." *Id.* at 743. Was the idea that employees could become owners so abhorrent that the court simply revised the nature of the claim to avoid even having to discuss the issue, i.e., finding it easier to imagine an obligation to provide for the employees in the contract with the purchaser rather than account to them out of the proceeds of the sale? Did the court simply not see the distinction? It is impossible to tell.

230. "Sweat equity" is the contribution to a partnership of labor instead of capital. See Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L.L. REV. 79, 109 (2001) (arguing that partnership law ought to be applied to cohabitation problems because "[p]artnership law offers a way to recognize the sweat equity of the partner who contributes more labor than cash to the relationship"). Obviously, there is no concept of sweat equity in employment law.

231. See *supra* note 222. The post-termination commissions rule is the opposite of the opportunity concept. The fiduciary duty theory of commission sales agreements contemplates the end of the post-terminations rule, at least as a default principle, and the use of the opportunity concept for purposes of analyzing the relative interests of employers and employees in commissions that accrue after termination.

232. For a description of contractarian and anti-contractarian debate, see discussion *supra* Part V.

“inceptional”²³³ opportunism. One commentator has suggested that whether a limitation on fiduciary duties passes muster under the RUPA’s “manifest unreasonableness” standard is a jury question.²³⁴ That seems to be the logical way to contend with the problem. By treating the question as one of fact, courts will be able to evaluate post-termination provisions in context, neither precluding nor sanctioning them as a matter of law.

The final discretionary act was the employer’s practice of moving employees away from the income stream created by their placement of SPAs. The facts imply that the commission agreement was silent on the question of whether or not the employees could be so moved, although it is difficult to ascertain whether it was actually silent or simply rendered silent by virtue of the court’s bad description. Specifically, the court noted that the agreement provided that sales employees would receive commissions “in two ways”: First, from the initial sale of the thermometer, and, second, from subsequent orders of probe covers.²³⁵ Context is not provided to allow the reader to determine whether the contract anticipated that both commissions would belong to the same sales employee.

Assuming for purposes of analysis that the contract was truly silent on the question, it is impossible to tell whether the employer’s policy would violate its duty of good faith and fair dealing. That is because it is impossible to tell whether the employer’s actions were opportunistic.²³⁶ The opinion suggests that employees were transferred away from accounts that they had initiated to other accounts. Money being fungible, employees might have been adequately remunerated in their new accounts, and thus not burdened unduly and without reason to complain. Furthermore, even if some employees earned more money because of the practice and other employees less, it is possible that the employer only benefited operationally and earned no additional profits. Unlike the employer’s bulk sale of the contracts to a third party, where the promise was to pay commissions to someone and the result was to pay them to no one, here all of the commission money was paid, just arguably to the wrong employees. Under

233. Opportunism that arises before implementation of a business agreement is usually termed “pre-contract” opportunism. See Kent, *supra* note 211, at 115. The term “inceptional” opportunism is substituted here because while “pre-contract” is broadly understood to cover all of the time antedating that magical moment when there is a meeting of the minds, the term inceptional seems more readily understood to include the drafting phase of the relationship.

234. See J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 451 n.49 (1997) (noting that whether a limitation is manifestly unreasonable “seems to be when a jury decides that it is”).

235. *Yearwood v. Southern Life Systems, Inc.*, 531 S.E.2d 741, 742 (Ga. Ct. App. 2000).

236. Smith, *supra* note 35, at 1409 (observing that the object of fiduciary duty is the restraint of opportunism).

such circumstances, it is likely the case that the employer had not acted opportunistically and thus the employees' remedy, assuming that one exists at all, would remain in contract.

The *Gadsby* decision illustrates the opportunism problem from a different angle. In *Yearwood*, the employer's opportunism was stark. In *Gadsby*, it is on some visceral level hard to decide who between the employer and the employee was the bigger opportunist. If the employer sought to stop paying commissions, the employee sought protection for a near no-show job that paid him a significant six-figure income.

It is submitted that the visceral reaction to Mr. Gadsby's claims as unseemly is caused by the fact that the law has no frame of reference for passively earned wages. We certainly tolerate passive earnings of other types, such as interest, dividends, stock appreciation and so on. When the money being paid is called wages, however, the expectation is that sums are being received for current services and the idea that someone could receive remuneration for work performed long ago, perhaps long after the employee has left her employment, is foreign and on some level distasteful. That impulse, clearly the animating spirit of the *Gadsby* decision and the post-termination commission rule, is borne of a failure to consider the entrepreneurial aspects of sales commission employment and to separate the wage question from the question of job security.

We do not know why Gadsby's employer chose the commission method that it chose. We do not know, for instance, if placing floor space was inordinately difficult, if the company lacked resources to pay someone to do the work on a straight salary basis or if it simply designed its commission program badly. What can be assumed is that the company understood its business model, which was to get its product placed in retail establishments and to fill orders as they came in through the retailers. As such, it could have come as no surprise to the employer that the sales employee's work was largely done after the floor space was arranged, and thus it is curious that the employer chose a commission method that seems better suited to a single sale of a product or service rather than the initiation of an ongoing source of revenue.

In any event, the court was faced with a stark choice: either the employee continued to collect his commissions for as long as his territory generated revenue or he lost all rights upon thirty days notice. Based upon the belief that infinite liability could not be presumed unless expressly stated, and that the structure of the agreement better supported the applicability of the termination provision, the court found for the employer.

By applying the fiduciary duty theory of sales commission agreements, the court would have approached the problem quite differently. First, it would not have been restrained by any presumption against infinite liability. Indeed, partnership law makes precisely the opposite

presumption, that in the absence of agreement to the contrary, a partner must be paid her commensurate share of partnership profits whenever such profits are realized.²³⁷ Beginning there, the court would have acknowledged that the termination clause sought to answer not one question but two: Under what circumstances could the parties terminate their relationship? What then would become of post-termination commissions? The first would be easy to answer: Upon thirty days notice. The second was not answered by the clear language of the commission agreement and thus resort would be made to the default rule: In the absence of agreement to the contrary, the revenue generating accounts constitute an opportunity belonging, proportionate to their equity interests as established in the commission agreement, to the employer and the employee.

Perhaps the most fascinating difference between a straight employment law approach to the case and one animated by principles of fiduciary duty is the analytic inversion of the comparator evidence.²³⁸ It will be recalled that the court viewed the plaintiff's inability to proffer evidence that he had been replaced by a younger employee as fatal to his age discrimination claim.²³⁹ Because opportunistic behavior is not something that employment law seeks to regulate, the court never considered that the same evidence, or rather lack of evidence, might help to prove that the employer was motivated by self-interest. If the plaintiff's poor relationship with a large client was the determinative factor in the employer's decision to terminate him, one would expect to see that the plaintiff was replaced by someone who could smooth things over. That the employer apparently saw no need to do so even years after the termination bolsters the view that all of the selling effort occurred before the employee was fired, and that the decision to terminate him had less to do with perceived harm to the employer's interests and more to do with the employer's desire to get out from under an unfavorable commission agreement.

237. *See supra* note 106 (describing the default situation of partnership law).

238. Comparators are individuals with whom the plaintiff compares herself for purposes of establishing a disparate treatment discrimination claim. *See Washington v. Milton Bradley Co.*, 340 F. Supp. 2d 69, 78 (D. Mass. 2004) (discussing comparator evidence in context of discrimination claim).

239. *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1331 (7th Cir. 1996).

VII. REFORM OF CONTRACT LAW VERSUS FIDUCIARY DUTY

Courts are slow to recognize new duties.²⁴⁰ The law finds it easier, on balance, to create new remedies for existing claims and to broaden rights with long historical antecedents than it does to acknowledge novel principles of liability.²⁴¹ One can debate the degree to which this paper proposes something novel; it can be argued that recognition of fiduciary status is more akin to broadening sales employees' existing rights than creating a new one from whole cloth.²⁴² It would be hard to argue, however, that fiduciary duty is the simplest answer and impossible to argue that it is the only solution to the problems posed by employer opportunism.

Indeed, the simplest solution would be to reform the law of contracts. Contract law's primary solution to the problem of opportunism is the

240. Often the cause is the doctrine of *stare decisis*. An eloquent explanation for that phenomenon was provided by District Judge Mitchell H. Cohen in *Caporossi v. Atlantic City, New Jersey*, 220 F.Supp. 508 (D.N.J. 1963), a case involving the recognition of tort liability against a municipal entity.

When viewed against the panorama of legal history, it seems inevitable that even with quickened enlightenment, responsive changes came more slowly and often with tedious caution. This seems especially true in regard to anciently venerated legal postulates which justify their continued existence on the pragmatic needs of remote times and outmoded conditions rooted in ritualistic adherence to the doctrine of *stare decisis*. *Stare decisis*, while a valuable and well established doctrine, should serve as a flexible channel marker for guidance and not as an immovable sand bar which may cause disaster; it should not be permitted to foreclose re-analysis and re-evaluation of legal postulates, which may have lost their vitalizing principle. If outmoded and artificial distinctions are to persist in confining a court of law to a choice of specific alternatives, one of which provides remedy for an injured individual, and the other does not, then the choice of remedy seems clear as the demands of justice must be obliged in each particular case.

Id. at 521.

241. See *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 165-66 (1964) (Goldberg, J. dissenting) (noting that allowing a new remedy is not affront to *stare decisis* as might be creation of a new duty or standard of liability); *Meller v. Heil Co.*, 745 F.2d 1297, 1305 (10th Cir. 1984) (holding that abolishing or creating new remedy does not create or impair vested right or impose a new duty because "there is no such thing as a vested right in remedies") (quoting *Jefferson County Dep't of Social Services v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980)); Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1423, 1491 (2002) (observing that "creation of new rights presents far greater separation of powers and federalism concerns than the creation of new remedies").

242. Contractarians posit that fiduciary duty is a subspecies of contract law. See Easterbrook & Fischel, *supra* note 194, 427 (arguing that "'fiduciary' relation is a contractual one characterized by unusually high costs of specification and monitoring Fiduciary duties are not special duties; they have no moral footing"). If contractarians are right, this paper proposes nothing more than a new twist on an old theme.

covenant of good faith and fair dealing.²⁴³ Thoughtful examinations of the covenant of good faith and fair dealing suggest that it is theoretically broad enough to proscribe most forms of sales employer opportunism:

The implied covenant of good faith and fair dealing is the residual gap-filling default rule of contract law. It imposes limits upon one contracting party's ability to negatively impact the contract's value to the other contracting party. It determines when a party may no longer pursue his own self-interest but must instead engage in cooperative behavior by deferring to the other party's contractual interests.²⁴⁴

Courts have utilized expansive interpretations of the covenant of good faith and fair dealing to solve commission problems in the past,²⁴⁵ and it is conceivable that the doctrine could be fortified to be more generally useful.²⁴⁶ Other contract doctrines, such as procuring cause doctrine²⁴⁷ or

243. See Thomas C. Cady & Georgia Lee Gates, *Post Claim Underwriting*, 102 W. VA. L. REV. 809, 826–27 (2000) (noting that Judge Posner's observations that "the fundamental purpose of contract law is to deter opportunism in the contractual relationship . . . find their way into the law of contracts through the doctrine of good faith and fair dealing"); Smith, *supra* note 35, at 1487 (opining that the "judicial efforts to police opportunism in contractual relations tend to be limited to the contract doctrine of good faith and fair dealing"). Professor Smith describes the differences between fiduciary duty and the covenant of good faith and fair dealing as follows:

[T]he duty of good faith is similar to fiduciary duty. Despite this similarity, the scope of these two doctrines is sufficiently different that they are not often viewed as tackling related problems. Fiduciary duty is typically more expansive than contractual duty. While fiduciary duty is determined by the structure of the relationship, the obligation of good faith and fair dealing emanates from the terms of the contract. The varying intensity of these obligations is attributed to the range of opportunistic behavior possible in each context. As noted above, the intensity of fiduciary duty should depend on the *likelihood* of harm and the *potential magnitude* of harm. Both the likelihood of harm and the potential magnitude of harm are often less in an arm's-length contract than in a fiduciary relationship because the allocation of residual control over the relevant resources provides fewer opportunities for self-serving behavior. As a result, the duty of good faith is typically weaker than fiduciary duty.

Id. at 1488–89 (emphasis in original).

244. Diamond & Foss, *supra* note 36, at 586.

245. See *Caton v. Leach Corp.*, 896 F.2d 939, 947 (5th Cir. 1990) (holding that fact question remained under California law whether employer opportunism that affected right to post-termination commissions violated covenant of good faith and fair dealing); *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 112 (2d Cir. 1985) (holding that a termination motivated by intent to deprive employee of accrued commission violative of covenant of good faith and fair dealing); *Nolan v. Control Data Corp.*, 579 A.2d 1252, 1258 (N.J. Super. Ct. App. Div. 1990) (holding that sales commission plan that allowed employer to make revisions at any time without notice, prospectively and retroactively, violated covenant of good faith and fair dealing).

246. By more "useful" it is meant applied by more courts to restrain employer opportunism. However, the fate of early experiments do not give one much to hope for.

the concept of quasi contract,²⁴⁸ could also be pressed into wider service.²⁴⁹

Two cases stand out in that regard: *Wakefield v. Northern Telecommunications Inc.*, 769 F.2d 109 (2d. Cir 1985) and *Ellis v. McKinnon Broadcasting Co.*, 23 Cal. Rptr. 2d 80 (4th Dist. 1993). In *Wakefield*, the court held that by discharging a sales employee in order to deprive him of commissions, the employer may have violated the covenant of good faith and fair dealing under New York state law, even though the commission agreement expressly stated that the employee was employed on an at will basis and had to be an active employee on the date the commissions were to be paid in order to qualify for them. *Wakefield*, 769 F.2d at 112. That opinion has not fared well, with most subsequent decisions suggesting that New York state courts have rejected *Wakefield's* application of the covenant of good faith and fair dealing. See *Monotype Corp. PLC v. Int'l Typeface Corp.* 43 F.3d 443, 452 (9th Cir. 1994) (suggesting that *Wakefield* has been rejected by New York state courts); *Knudson v. Quebecor Printing (U.S.A.) Inc.*, 792 F.Supp. 234, 238–39 (S.D.N.Y. 1992) (same). In *Ellis* the California Court of Appeals applied another contract device in order to void an unfair provision in a commission agreement: substantive unconscionability. *Ellis*, 23 Cal. Rptr. 2d at 83. The provision stated that employees would forfeit any commissions accruing after termination. *Id.* at 81. The court of appeals held that the provision was substantively unconscionable and unenforceable. *Id.* at 85. However, a later opinion from a different division of the same court refused to follow *Ellis*, noting that the opinion was “hard to reconcile with other California appellate decisions which have shown considerable restraint in second-guessing provisions in employment contracts governing payment of sales commissions upon termination of employment.” *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 482 (Cal. Ct. App. 1996).

247. The “procuring cause” doctrine provides that “if the parties have not reached an express agreement concerning the payment of commissions in the event of termination, . . . the sales representative is entitled to recover commissions on all sales for which it was the procuring cause.” *Randall J. Gillary & Kevin P. Albus, Unsupportable Limitations on Michigan's Procuring Cause Doctrine in the Case of Roberts Associates, Inc. v. Blazer International Corp.*, 2004 MICH. ST. L. REV. 101, 106 (2004). However, the rule also provides that “if the parties have reached an express agreement concerning the commissions to be paid in the event of termination, the express agreement generally will control, and commissions should be paid as required by the agreement.” *Id.* The problem for sales employees is the notion that express agreements trump the procuring cause rule. In *Gadsby*, the court held that because there was an express term governing how post-termination commissions were to be paid, the procuring cause doctrine was inapplicable. *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1328 (7th Cir. 1996). As noted previously, the agreement at issue in *Gadsby* was hardly a model of clarity and thus for the procuring cause doctrine to be useful, it would have to be recast as a presumption and not a default principle, a highly unlikely reform given the number of judicial opinions describing its role as a contract gap filler.

248. “Quasi contract” is “[a]n obligation which the law creates in absence of agreement; it is invoked by courts where there is unjust enrichment.” *CSX Transp. Inc. v. Marquar*, 980 F.2d 359, 372 n.20 (6th Cir 1992) (quoting BLACK’S LAW DICTIONARY at 1120 (5th ed. 1979)). In *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 320 F.Supp.2d 164, 177 (S.D.N.Y. 2004), the court noted that an unjust enrichment or quantum meruit claim requires proof that “the circumstances were such that equity and good conscience require defendants to make restitution.” Because the plaintiff in that case was employed on an at will basis, the court held that it had no expectation of future commissions and thus no basis to argue that equity and good conscience required restitution. *Id.* In *Gadsby*, the plaintiff made a similar claim leading to similar results:

Gadsby’s claim for restitution was also properly dismissed in light of the express contract between the parties. Gadsby has not provided any persuasive

Ultimately contract law reform is not a promising strategy for change, for at least two reasons. First too many courts are on record as stating that contract default rules—particularly the covenant of good faith and fair dealing—do not trump the at will rule, even in wage accrual disputes where one might expect to see a greater willingness to depart from free contract orthodoxy.²⁵⁰ To imagine that all of those courts will now acknowledge

arguments for departing from the general rule that restitution is unavailable where an express contract governs the parties' relationship and where there is an adequate remedy at law.

Gadsby, 71 F.3d at 1333. In order for quasi contract to be a meaningful cause of action for sales employees, it would be necessary, much as it would be for the procuring cause doctrine, to recast the concept as a presumption (i.e., employers are deemed to be unjustly enriched when they fail to pay employees commission to which they have a right to expect), again an exceedingly unlikely reassessment of a long-established principle of law.

249. One scholar has suggested that contingent salary and benefit arrangements be treated as option contracts. Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1 (1992). Professor Tiersma notes that section 45 of the Restatement of Contracts provides that "when an offeror does not invite a promissory acceptance (intending a unilateral contract), an option contract is created when the offeree tenders or begins performance. . . . As a result, the offeror cannot revoke." *Id.* at 12. Thus:

[p]articularly if the purpose of the bonus is to induce an employee to remain in service for a specified time, it may be reasonable to infer that the employer is implicitly promising to retain the employee (barring good cause for dismissal) for that period of time. Where there is such a promise, express or implied, the employer who discharges an employee or terminates the bonus plan is repudiating or breaching the promise by preventing the employee from meeting the conditions for payment. If it is likely that the employee would have been willing and able to complete the required performance absent the breach, uncertainty is not a critical factor. Furthermore, the employee will quite rationally rely on having employment for the stated period and might well pass over other opportunities. Full expectation damages thus seem quite appropriate.

Id. at 67. The theory is interesting but no more promising than any other, at least in the absence of a substantive re-assessment of what sales agreements are. As Professor Tiersma concedes:

in an illustration to section 45 . . . the *Restatement* reaches the counterintuitive conclusion that because the offeror retains the power to revoke (i.e., to terminate the bonus plan), there is no offer or promise at all. In other words, not only is there no promise to keep the bonus offer open, but there is also no promise to pay a bonus under specified circumstances—there is merely an offer that can be accepted only by completed performance.

Id. at 66–67. Which brings the matter back to where it starts: what was the agreement between the parties?

250. See, e.g., *Production Prod. Co., v. Vision Corp.*, 706 N.Y.S.2d 289, 291 (N.Y. App. Div. 2000) (no covenant of good faith and fair dealing in sales commission agreement otherwise terminable at will); *James H. Washington Ins. Agency, v. Nationwide Mutual Ins. Co.*, 643 N.E.2d 143, 148 (same); see also *Melnick v. State Farm Mutual Auto. Ins. Co.*, 749 P.2d 1105, 1109–10 (N.M. 1988) (same, and noting that numerous other jurisdictions follow same rule).

that they were mistaken is fanciful.²⁵¹ Second, and perhaps most importantly, contract-based duties simply lack the breadth to compete with the at will rule on anything approaching a level playing field. What is needed is a source of rights capable of transcending the four corners of the agreement that creates the relationship, an improbable, if not illogical, mandate for the law of contracts.²⁵²

A rather stark illustration of the point is provided by the Supreme Court of Washington's opinion in *Willis v. Champlain Cable Corp.*²⁵³ In *Willis*, a commission sales agent entered into a commission agreement with a wire manufacturer that allowed either party to terminate the agreement on 30 days notice.²⁵⁴ The agreement specifically provided that in the event of termination, the employer's obligation to pay commissions was limited to orders accepted by it up to and including the termination date. During his employment, the sales agent endeavored to convince an extremely large corporation, Boeing Company, to use his employer's product as "the general purpose wire for its airplanes."²⁵⁵ He was terminated, effective September 24, 1976, and Boeing began using the employer's products, because the employee's efforts, in July of 1978. The court accepted as fact that at the time of the employee's termination, the employer "had reason to believe"²⁵⁶ that Boeing would convert to it as its supplier of general purpose wire.

The court refused to recognize that the covenant of good faith and fair dealing or the procuring cause rule provided any basis to restrain the employer's actions, even if the employee could have established that the employer was motivated by bad faith. It based its holding on two conclusions. The first was that neither the implied covenant of good faith and fair dealing nor the procuring cause rule could "override an express contract provision stating the manner in which commissions would be paid."²⁵⁷ The second was the policy determination that employment at will contracts do not contain implied limitations on employer discretion:

An employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment and [the implied covenant of good faith and fair dealing] does not strike the proper balance. We believe that "to

251. See Gregory Scott Crespi, *Is a Signed Offer Sufficient to Satisfy the Statute of Frauds?*, 80 N.D. L. REV. 1, 8 (2004) (arguing that the large body of case law on this question militates against new interpretation).

252. See Smith, *supra* note 35, at 1488 (describing fiduciary duty as broader than the covenant of good faith and fair dealing).

253. *Willis v. Champlain Cable Corp.*, 748 P.2d 621 (Wash. 1988).

254. *Id.* at 622-23.

255. *Id.* at 623.

256. *Id.* at 623.

257. *Id.* at 627.

imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions in the amorphous concept of bad faith.' Moreover, while an employer may agree to restrict or limit his right to discharge an employee, to imply such a restriction on that right from the existence of a contractual right, which, by its terms has no restrictions, is internally inconsistent.²⁵⁸

Obviously if contract duties can be no broader than those described within the four corners of an unambiguous agreement, such duties are not broad enough to prevent inceptional opportunism. Moreover, even beyond the problem of inceptional opportunism, there is the sense, manifest in *Willis*, that contract duties do not have the doctrinal fortitude to compete with the at will rule where the two will continue to collide, at the margins between an employee's interest in a contingent wage and an employer's interest in running its business as it sees fit. The at-will principle is focused and clear: the employer may prospectively affect the terms and conditions of an employee's employment at any time for any reason. The covenant of good faith and fair dealing, by comparison, is unfocused and murky: it has something to do with good faith, but is difficult to define in the abstract. The necessary context is invariably the terms of the contract giving rise to the duty, which, as the *Willis* court points out, gives rise to a circularity: if the contract is silent on a particular question, how do we coherently answer the question by reference to the contract?

Fiduciary duty is as clear and as focused as the at will rule. It stands for the proposition that fiduciaries may not act self-interestedly at the expense of their principals. It is a duty created by contract but not bounded by it; it sets the correct tone, carries the correct message, and is therefore the appropriate standard for restraining employer opportunism under sales commission agreements.

VII. CONCLUSION

The at-will rule may or may not serve a useful purpose. This Article did not weigh in on that controversy. Assuming that there is a reason to keep the rule, there is no justification for applying it to sales commission disputes that feature allegations of employer opportunism. Regarding compensation, commission employees are not like other employees. When fixed-compensation employees are terminated, it is possible to effect the clean break envisioned by the at will rule. Wage payment laws and other agency principles ensure that employers settle up with employees before or shortly after termination, and thus nothing is left on the table when the

258. *Id.* at 624 (quoting *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1086 (Wash. 1984) (citation omitted)).

parties part company. Such is not the case for commission employees. For them, wages do not accrue over time. As a consequence, much is left on the table, and if employers are as free to affect accrual as they are to affect job security, it is possible to fire employees and steal the value of their labor. This Article has illustrated how courts from around the country have sanctioned just such behavior.

The reform suggested by this paper is to separate analytically the wage question from the question of job security. Questions of job security remain the province of employment law and the at-will rule. Questions concerning commissions are subject to the rule that employers are fiduciaries and may not act opportunistically unless two conditions are met: first, that the action is clearly permitted by the commission agreement; and second, that the provision permitting the action is not deemed manifestly unreasonable.

The fiduciary standard advocated here was derived from partnership law. Partnership law is the appropriate starting place for analyzing commission disputes because sales employment and partnership status are related economic categories: they both feature delayed remuneration, compensation as a percentage of profit and reliance on the loyalty and good faith of co-adventurers. As such, they exhibit similar vulnerabilities to opportunism. This paper has endeavored to make the case that they also benefit from similar ameliorative counter-measures.

Some will argue that the proposed reform would result in additional litigation and fewer commission jobs. It is very hard to address such fears without devolving into the pat response: i.e., they do not justify the continuation of an illogical set of rules. Beyond that, it seems clear that those who continued to employ commission-based compensation systems would take pains to draft clear agreements and avoid resolving commissioning disputes in a manner that might later be viewed as opportunistic. The system that remained, in other words, might be smaller, but it would be fairer.